Vol. 78

Vol. 78

50440

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
EDWARD P. MITCHELL,
Defendant-Appellant.

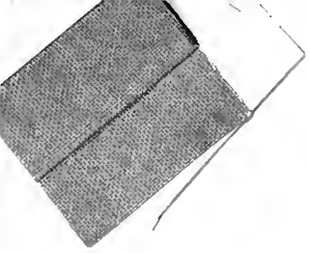
APPEAL FROM
CIRCUIT COURT
COOK COUNTY
CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty by a jury of the offenses of unlawful possession and unlawful sale of narcotics. He was sentenced to 10 years to life in the penitentiary on the sale conviction and 2 to 10 years on the possession conviction, the sentences to run concurrently. He appeals.

Defendant maintains that the trial judge improperly admitted a confession into evidence which was given by defendant to the arresting police officers without defendant having been advised of his right to counsel and his right to remain silent; that the trial judge erred in failing to sustain defendant's motion to suppress the confession in the light of facts showing the confession to have been made involuntarily and under coercion; that his motion to suppress evidence seized from him after his arrest without a warrant and without probable cause should have been granted; and that the evidence did not show him guilty beyond a reasonable doubt.

On the night of February 17, 1961, Chicago Police Officer John Deering of the Narcotics Division received a telephone call from police informer Edward Boliaux. About 6:00 A.M. the following morning Boliaux told Officer Deering and Police Officer Gill at police headquarters that he, Boliaux, could make a controlled purchase of narcotics from the defendant. Boliaux was thoroughly searched and no narcotics or money was found on his person. He was shown $30 in pre-recorded bills and signed a slip bearing the numbers of the bills. Officer Deering and Boliaux then proceeded to Madison Street and Ogden Avenue in Chicago, where Boliaux made a telephone call to the Viceroy Hotel



located at 1519 West Warren Boulevard. Officer Gill proceeded to the location in another car. After the telephone call, Officer Gill and Boliaux proceeded in one car, and Officer Deering in the other car, to the vicinity of the Viceroy Hotel, parking in front of 1620 West Warren Boulevard, some three-quarters of a block from the hotel. Twenty minutes later defendant arrived in a taxicab and entered the hotel. Some ten minutes later Boliaux exited the hotel, returned to the car of Officer Deering and gave him 7 tin-foil packages. Officer Deering made a field test of the contents of one of the packages, while Officer Gill walked to a point near the entrance of the hotel. The test showed the package contents to be narcotics and Officer Deering signalled this finding to Officer Gill. Officer Gill entered the lobby of the hotel, arrested defendant, placed him in handcuffs, and searched him. The officer recovered a $5 bill and five one dollar bills of the pre-recorded money from defendant as well as two packages which later proved to contain narcotics.

Officer Deering entered the hotel shortly, was handed the money and the two packages taken from the defendant, and also recovered a $20 bill lying on the hotel desk which was also part of the pre-recorded money.

Officer Gill and defendant took an elevator to defendant's room in the hotel. The room was searched but no narcotics were found. Officer Gill testified that while in the room defendant admitted the sale of narcotics and further offered to show the officers where he kept the narcotics, but upon a search of the location no narcotics were found.

The officers, defendant and Boliaux proceeded to police headquarters at 11th and State in Chicago. Boliaux waited a short while in the hallway and later joined the officers and defendant in Room 303. The officers testified that defendant admitted the sale of narcotics

and offered to make a statement. They questioned defendant and reduced his answers to a typewritten statement which was submitted to the defendant for his signature. Defendant corrected the statement with regard to his age and then dated and signed the statement.

Police informer Edward Boliaux was confined to the state penitentiary on a burglary conviction at the time of defendant's trial. He testified at the case in chief that he was a narcotics user and that he had been employed as a narcotics informer by the police on a number of occasions in the past. He testified he received a telephone call from defendant on the morning of February 18th after he entered the Viceroy Hotel, that he waited in the hotel some fifteen minutes for defendant to arrive, and that upon defendant's arrival he and defendant went to defendant's room on the sixth floor. Defendant gave him 7 tin-foil packages in exchange for the $30 in pre-recorded bills. Boliaux then left the hotel, gave the 7 packages to Officer Deering and waited in the car after the officers left. The officers returned from the hotel with defendant and the four men proceeded to police headquarters at 11th and State. After waiting in the hallway a short while Boliaux was summoned into Room 303 by Officer Gill. The officers questioned defendant and defendant signed his name to the typewritten statement which had been submitted to him.

Defendant testified in his own behalf and stated that he returned from a hospital on the morning of February 18th and saw Boliaux in the lobby of the hotel. Boliaux owed him some $85 on a past debt and Boliaux wanted to see him in order to pay something on the debt. Boliaux gave defendant $30 and defendant gave $20 to the hotel clerk in payment of rent. Defendant stated Boliaux then left the hotel and shortly thereafter Officers Gill and Deering entered with guns drawn, handcuffed defendant and searched him. Defendant denied that narcotics were found on or removed from his person.

Defendant testified that on the way to his room in the hotel, Officer Gill beat him and again abused and threatened him while in the room. He denied that he admitted to Officer Gill the sale of narcotics and further denied that he had offered to show the officers where narcotics were kept.

Defendant further testified Officer Gill again abused and threatened him at police headquarters. He stated that at no time did he make a statement admitting the sale or possession of narcotics and that the sole reason he signed the statement submitted to him by the officers was because he was afraid of further physical abuse. The officers and Boliaux denied force or threats were used on defendant.

Defendant first maintains the trial court erred in allowing his confession into evidence, for the reason that defendant was not advised of his right to counsel nor of his right to remain silent when he gave the statement to the officers, relying on Escobedo v. Illinois, 378 U.S. 478, in support of this position. Defendant was tried some two months prior to the decision in the Escobedo case and therefore, under the decision in Johnson v. New Jersey, 384 U.S. 719, the Escobedo case is not applicable here.

From the record it appears defendant is an intelligent individual. The testimony of Officer Gill shows that defendant's first confession was made in defendant's room at the hotel, and appears to have been completely unsolicited, having been made by defendant without any form of interrogation on the officer's part. Defendant further offered to show the officers where he kept narcotics although nothing was found. Defendant again confessed and offered to make a statement at police headquarters. He freely signed the confession statement at police headquarters, as is indicated by his correction concerning his age on the statement. Under the facts of this case we are of the opinion that the trial court properly allowed the confession into evidence and that the record shows defendant was in no way prejudiced

by his lack of counsel at the time he signed the confession statement, especially in the light of the facts which transpired prior thereto. See People v. Scott, 63 Ill. App.2d 232, 238.

Defendant next maintains that, under the circumstances subsequent to his arrest and search, the motion to suppress the confession should have been allowed. This point is closely related to defendant's first point, and concerns the failure of the police officers to advise defendant of his right to counsel, the fact that he was alone with the officers at the time he signed the statement, and the alleged force, coercion and threats with which the officers compelled him to sign the statement. We have read the record in this regard and find that the state showed that the confession was voluntary. Ill. Rev. Stat. 1965, Chap. 38, Par. 114-11. The "attendant circumstances" alluded to by defendant as "requiring the trial court to sustain his motion to suppress the confession" were created primarily by defendant's own testimony at the hearing on the motion which the trial court specifically found to be unbelievable in view of the claims made by defendant.

Defendant further maintains he was arrested without a warrant and without probable cause and that the money and narcotics found on his person as a result thereof should have been suppressed. The police officers testified that they had used Boliaux in the controlled purchase of narcotics in the past and that arrests had been made as a result of his efforts. While the testimony of the officers at trial on this matter appears to differ from the testimony given at the hearing on the motion to suppress the evidence, a comparison of the testimony indicates that, while Boliaux was never used personally by Officers Gill or Deering, he had in fact been used by the police in the past, he had been effective, and Officers Gill and Deering knew of these facts. It is well established that a tip from an informer, known by the officers to be reliable, will constitute probable cause

upon which an arrest without warrant and a subsequent search of a person may be founded. People v. Durr, 28 Ill.2d 308, 311. Officers Gill and Deering knew of Boliaux. Boliaux was given pre-recorded money, went into a predesignated location and returned with 7 tin-foils of white powder which proved to be narcotics after a field test. Officer Gill also knew defendant, having arrested him on two prior occasions. Although Boliaux was available at the time of the hearing to suppress the evidence, having been brought from the penitentiary at the request of defendant, the latter did not call him as a witness. Under these facts we find that the arrest and search of defendant was effected with probable cause. See also People v. Fleming, 33 Ill.2d 431.

Defendant maintains that the trial court erred in permitting defense counsel to request in the motion to suppress the evidence only that the pre-recorded funds be suppressed, and not the narcotics found on defendant. Apparently defense counsel's reason for his refusal to include the narcotics in the motion to suppress was the mistaken theory that its inclusion in the motion would be inconsistent with defendant's denial of possession of the narcotics. This matter is moot in view of our holding that the arrest and search of the defendant was made with probable cause and that the motion to suppress the evidence was properly denied.

Defendant finally contends he was not proved guilty beyond a reasonable doubt. However, the discrepancies in the testimony to which defendant alludes are trivialities and do not affect the substance of the State's evidence.

Officers Gill and Deering gave clear and convincing testimony of the events prior and subsequent to the sale of the narcotics and of the recovery of the narcotics from defendant's possession. Furthermore, unlike the ordinary narcotics informer case, the police informer,

Boliaux, in the case at bar testified to the actual sale of the seven packages of narcotics. We are of the opinion that defendant's position is not supported by the record.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.

50572

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GENE AUTRY DEAN, OTTO DEAN and ROOSEVELT CASTLEBERRY, Defendants, (Impleaded), Appellants.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY CRIMINAL DIVISION.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendants were found guilty by a jury of the crime of rape and were sentenced each to a term of 40 to 60 years in the state penitentiary. They appeal.

About 10:00 A.M. on October 9, 1964, the complaining witness Ann Godfrey, a pregnant woman and mother of three children, was waiting for a bus at the intersection of Harrison and State Streets in Chicago. Three men, later identified as the three defendants, drove up in an automobile and one of the men asked Mrs. Godfrey if she wanted a ride. She refused to talk to them, whereupon they drove away but returned about five minutes later. Two of the men got out of the car, one of them wielding a straight razor and the other telling Mrs. Godfrey to be quiet, and forced Mrs. Godfrey into the car. She began to scream and Gene Autry Dean struck her on the side of the head near the eye, telling her to be quiet.

The men thereafter purchased and consumed some liquor and proceeded to the 1800 block of South Springfield Avenue to the apartment of Catherine Wise. Two of the defendants went into the Wise apartment and Catherine Wise returned and invited Mrs. Godfrey to her apartment. Mrs. Godfrey refused, stating that she had a family and wanted to go home. An argument then ensued between Gene Autry Dean and Mrs. Godfrey, and Dean proceeded to beat her. She was forced into the Wise apartment, at which time one of the men took $9.70 from Mrs. Godfrey and gave some of the money to Catherine Wise to purchase groceries.

While in the apartment defendant Castleberry offered Mrs. Godfrey money to have intercourse with him; she refused and he left the room. Thereafter, Mrs. Godfrey testified, all three men proceeded to have intercourse with her, two times apiece. During one of the acts Mrs. Godfrey began to scream and Gene Autry Dean again threatened her with the razor and told her to be quiet. Mrs. Godfrey was taken from the apartment between 3:30 and 4:00 P.M., whereupon she proceeded by public transportation to the home of her mother-in-law in the 3400 block of South Giles Avenue, where she made complaint of what had happened. Mrs. Godfrey was later driven to her own home and then to a police station where she made a report of what had happened. About 8:00 P.M. she was taken to the Cook County Hospital for an examination. The examining doctor testified that he examined Mrs. Godfrey on the evening of October 9th and found injury and swelling around her left eye, evidence of recent intercourse, and no bleeding or injury to her genitalia.

Catherine Wise was originally indicted with the three defendants for the crime charged, but testified for the State at the trial. She testified that the three defendants came to her apartment with Mrs. Godfrey on October 9, 1964, and that one of the men gave her some money and told her to buy groceries. Upon her return she witnessed four acts of intercourse perpetrated upon Mrs. Godfrey by defendants Castleberry and Gene Autry Dean. She further testified that Mrs. Godfrey was crying during the incidents, but that she heard no complaint or outcry at any time nor did she see a razor in the possession of any of the defendants. Catherine Wise identified a bottle of medicine left in her apartment by Mrs. Godfrey, the medicine allegedly being for Mrs. Godfrey's anemia.

None of the defendants testified in his own behalf. The first defense witness, Moses Lancelin, operated an employment agency and testified that Ann Godfrey executed a job application at his office

on October 9, 1964, between the hours of 10:00 A.M. and 12:00 noon. Mandel Jacobson, a pharmacist, testified that on October 9, 1964, he filled a prescription for Ann Godfrey and that the prescribing doctor officed on West Roosevelt Road in Chicago. Henry McIntosh testified that he saw Otto Dean and Ann Godfrey about 4:00 P.M. on October 9, 1964, come out of a basement in the 2200 block of South Kolin Avenue in Chicago. Ella Virghes testified that she saw Gene Autry Dean, Roosevelt Castleberry and a lady get out of an automobile and enter a restaurant in the 700 block of South California Avenue about 1:00 or 2:00 P.M. on October 9, 1964. Julia Beverly, the landlady of Catherine Wise's apartment building, testified she saw one of the defendants, Ann Godfrey and Catherine Wise on their way to the Wise apartment about 2:30 P.M. on October 9th. Miss Beverly testified she was in her apartment which adjoined the Wise apartment and did not hear any noise, screaming or loud talking coming from the Wise apartment, nor did she see any evidence of force being used at the time she witnessed the three persons in the hallway. Tina Dean Leavell, the mother of the Dean brothers, testified that Otto Dean sustained a stab wound in his left thigh which extended almost to his groin in September of 1964, and that he was still limping on October 9th.

Defendants maintain on this appeal that the evidence does not show them guilty beyond a reasonable doubt, that certain physical evidence was not given to the jury when they retired to deliberate, that the State failed to name Catherine Wise on a pre-trial list of prospective witnesses, and that certain statements made by the prosecuting attorney were prejudicial.

The record shows that the jury was warranted in finding defendants guilty beyond a reasonable doubt. Mrs. Godfrey's account of the incidents is both clear and convincing, and was unshaken on cross-examination. Her testimony is further corroborated by independent

facts and by the testimony of Catherine Wise. Mrs. Godfrey testified that force was used on her person in the form of beatings and threats with a straight razor. The doctor who examined her at Cook County Hospital testified that the side of her face was swollen and bruised. Catherine Wise corroborated four of the six acts of intercourse, one of the beatings, the swollen eye and the fact that Mrs. Godfrey was crying while the acts were being perpetrated. The fact that Mrs. Godfrey waited until she arrived at the home of her mother-in-law before she made a complaint does not, as defendants maintain, substantially weaken her testimony. It is reasonable that a woman who has undergone such an ordeal should wish to relate the incident only to a close friend or relative, rather than to a stranger on the public street. Mrs. Godfrey also testified that she was unfamiliar with the neighborhood in which the incident occurred and that defendant Gene Autry Dean told her upon her leaving the Wise apartment not to get any "funny ideas, because the people on the west side don't take nothing."

Defendants' defense at trial was apparently that Mrs. Godfrey consented to the acts in question. Not only is the record devoid of any such evidence, but defendants' contention in this regard on appeal is speculative. The amount of resistance which was necessary was for the jury to determine under the circumstances in which Mrs. Godfrey found herself. It is well settled that resistance is unnecessary where it either will be futile or will endanger life. People v. Smith, 32 Ill.2d 88. We feel the jury was warranted in finding that the beatings and the razor threats by Gene Autry Dean was sufficient force to necessitate submission on the part of Mrs. Godfrey. Furthermore, the force used by Gene Autry Dean is attributable to the other two defendants. People v. Smith, 32 Ill.2d 88. Defendants also point to the fact that the doctor did not find any damage to Mrs. Godfrey's genitalia and consequently she consented to the acts. It is not true that vaginal irritation is an essential product of forcible intercourse.

People v. Smith, 58 Ill. App.2d 123, 131-132.

Defendants further maintain that the jury, when they retired for deliberation, was not allowed to examine the medicine bottle identified by Catherine Wise nor the employment application allegedly executed by Mrs. Godfrey. Although it appears from the record that the court directed that the jury take the evidence into the jury room, it appears that these articles were not taken into the jury room. The medicine bottle was never entered into evidence and it therefore would have been error for this article to go into the jury room. People v. Holcomb, 370 Ill. 299, 300. With regard to the employment application, the allowance of exhibits into the jury room is within the discretion of the trial judge. See People v. Dolgin, 415 Ill. 434, 451. The trial court directed that the exhibits be taken into the jury room, but it does not appear that any effort was made by the defense to have the application taken into the jury room. Also, the testimony concerning the making of the application was heard by the jury. We feel that defendants were in no way prejudiced by the failure of the jury to take the application into the jury room when they retired.

Defendants further maintain that the State did not supply the defense with the name of Catherine Wise as a potential State's witness before the trial. Several months prior to the trial the State was requested to furnish a list of prospective prosecution witnesses. The State failed to provide such list, but no pre-trial claim of non-compliance appears to have been registered by the defense. In opening argument on the day of the trial, the prosecution stated that the State would use Catherine Wise as a witness. Defense counsel also alluded to this fact in his opening statement, telling the jury that the State made a deal with Catherine Wise in that, if she testified according to the way the State wanted, she would not be prosecuted. At trial, Catherine Wise testified without any objection or claim of

surprise having been made by the defense. Under these circumstances we do not feel the defendants were in any way prejudiced or taken by surprise by the State's failure to supply the defense with the name of Catherine Wise prior to her becoming a witness. See People v. Poland, 22 Ill.2d 175, 184.

Defendants' final contention is that certain statements made by the assistant State's Attorney in his closing argument were prejudicial. The State's Attorney referred to these defendants as "these three things," described himself as a representative of the people of Cook County, and otherwise urged the jury to do their duty as jurors. Calling defendants "these three things" was within the scope of legitimate argument. People v. Elder, 25 Ill.2d 612. A prosecutor may describe himself as a representative of the people of the county and may otherwise urge a jury to effect a fearless administration of the law. People v. Brown, 16 Ill.2d 482; People v. Miller, 13 Ill.2d 84.

The judgment as to each defendant is affirmed.

JUDGMENT AFFIRMED AS
TO EACH DEFENDANT.

BRYANT, P.J., and LYONS, J., concur.

50500

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DAVID LANNES, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was initially found guilty at a bench trial on March 20, 1960, of the murder of his estranged wife and was sentenced to 30 years in the State penitentiary. Upon defendant's appeal to the Supreme Court, the State confessed error, apparently because of some irregularity in a sanity hearing, and the judgment was reversed and the cause remanded for a new trial. Defendant was again found guilty at a jury trial on December 20, 1964, and was sentenced by the trial judge to a term of 90 to 120 years in the State penitentiary. He appeals.

Defendant maintains on this appeal that the trial court erred in admitting into evidence a confession taken from him by an assistant State's attorney while defendant was not represented by counsel and at a time when he was mentally ill; that the trial court erred in applying the sentencing provisions of the Criminal Code of 1961, in effect at the time of the second trial, rather than the provisions of the law in effect at the time of the commission of the crime; that the jury was improperly instructed; that the conduct of the trial court was prejudicial to defendant and deprived him of a fair trial; and that the trial court committed error in excluding certain evidence which bore on defendant's mental condition after the date of the homicide.

Defendant interposed alternative defenses at the trial, that he accidently shot his estranged wife, Marilyn Lannes, and that he shot her while mentally unable to conform his conduct to the requirements of the law.

Defendant purchased a revolver on June 30, 1959, and on July 1st told his secretary that he had gone to his wife's place of employment to kill her but that he had changed his mind. His secretary took the weapon from him and refused to return it, but on July 3rd defendant purchased a second revolver.

After defendant's divorce and separation from his wife, his wife and the Lannes children lived with the Silver family, long-time mutual friends of the Lannes family. On July 3, 1959, upon returning to Mr. Silver's automobile after a shopping trip, Mrs. Lannes entered the car on the passenger side and, as Mr. Silver went around the car to the driver's side, he witnessed defendant drag Mrs. Lannes out of the car, place a gun to her head and shoot her. Defendant then fled the scene pursued by Mr. Silver, whom defendant eventually shot. The same afternoon Mrs. Silver received a telephone call from defendant and defendant stated that "Marilyn will never marry anyone else" and that Mrs. Silver would soon be hearing from the police.

Mrs. Shirley Decker, defendant's sister, testified that, as a youngster, defendant could not keep friends, that defendant's mother loved him but his father did not, that defendant's wife was friendly with a Mr. Weber, that defendant had made several suicide attempts, and that the entire Lannes family had been treated by a Doctor Mehlinger.

Defendant testified that he had been under the care of Doctor Mehlinger from 1952 until defendant's arrest, that he was accustomed to taking barbiturates, that on seven occasions he attempted suicide, and that an affair had been carried on between his wife and Mr. Weber. In his confession at police headquarters several hours after the murder, defendant stated that he could not remember the fact of the killing.

As in the first trial of this cause, a suggestion of defendant's insanity was made at the second trial and a hearing conducted. Defendant executed a jury waiver for the insanity hearing and, after the hearing, the court found him sane and able to stand trial.

Concerning the defense of insanity, Doctor Marvin Ziporyn testified for the defense. He stated he examined defendant on three occasions prior to the second trial, at which point the State interposed an objection to the witness' testimony as to what defendant told him relative to defendant's mental condition at the time of the commission of the crime. The grounds of the objection was that Doctor Ziporyn was not defendant's treating physician. The State further objected to the doctor's testimony concerning certain of defendant's prior hospital records. Both objections were sustained. The witness testified upon a hypothetical question that defendant was psychopathic and, at the time of the commission of the crime, was unable to conform his conduct to the requirements of the law.

An offer of proof was made by the defendant that, after his first conviction in 1960, he was taken to Menard Prison where he was given electric shock treatments for a mental condition. The matters contained in the offer of proof was not allowed to go to the jury, the trial court stating that it was too far removed in time from the commission of the crime.

Doctor William Haines, a State's witness, testified upon a hypothetical question that at the time of the homicide, defendant was not suffering from a mental defect or disease such as would keep him from being able to conform his conduct to the requirements of the law. Doctor Haines testified that he had examined defendant before and after the homicide and found defendant to be a manic depressive, but that this condition did not prevent him from appreciating the criminality of his conduct. He further stated that the loss of memory

claimed on various occasions by the defendant was not a consequence of his emotional problems.

The trial judge participated in the voir dire examination before the second trial by questioning the prospective jurors as to whether they had religious or conscientious scruples against the infliction of the death penalty in a proper case. Later, the assistant State's attorney suggested that the defense of insanity be governed by the law which existed prior to the 1961 Criminal Code, to which suggestion defense counsel vehemently objected on the grounds that the 1961 Criminal Code was remedial in its effect and that it should govern the trial of the cause. The trial court determined that the defense of insanity would be governed by the 1961 Criminal Code, rather than by the law in effect at the time of the commission of the crime, and that the application of the provisions of the 1961 Code in that regard was for the benefit of the defendant.

Over defendant's objection the confession taken from him by an assistant State's attorney after his arrest was entered into evidence. It appears the questioning during which the statement was given lasted some 20 to 30 minutes. The confession, along with all other exhibits in the case, was read to the jury at the close of all of the evidence. Also read to the jury was a report from the Cook County Psychopathic Hospital that, on November 17, 1953, defendant was admitted to the hospital as a person in need of treatment and was released 4 days later in the custody of his father. Another document was read to the jury that on July 5, 1958, defendant was hospitalized for 9 days. Following each commitment, defendant was restored.

After the finding of guilty defense counsel filed a written motion for a new trial on the grounds of newly discovered evidence in the form of records of certain mental treatment given to the defendant immediately after his arrest. The motion was denied.

Defendant first maintains it was error for the trial court to proceed under the Criminal Code of 1961 in a trial for a murder occurring prior to its effective date. Defendant's position on this appeal, that he was prejudiced by the application of the 1961 Code, is wholly inconsistent with his approach and attitude at the trial of this cause. Defense counsel vehemently objected to the State's suggestion that the law pre-dating the 1961 Code should govern the case. Defense counsel argued that the provisions of the 1961 Code are remedial, that they would govern the trial only from a procedural standpoint, and that the application of the 1961 Code would not involve a question of a change of substantive law so far as this cause was concerned. The trial court found that the application of the 1961 Code would benefit the defendant and allowed him to plead the defense of insanity under the Code. Defendant further contends it was error for the trial court to fix the penalty after the verdict of guilty by the jury, because the law pre-dating the 1961 Code required the jury, in a jury case, to fix the penalty. People v. Wright, 30 Ill.2d 519, and People v. Mackey, 30 Ill.2d 190, are determinative of this question. The penalty could properly have been fixed by the trial court.

Defendant next contends that it was prejudicial for the trial judge to qualify for the jurors as to whether or not they would apply the death penalty should the facts of the case warrant it. The question raised in this regard has been answered in the case of People v. Bernette, 30 Ill.2d 359, 368. It should also be noted that the trial court in the Bernette case took considerably more of an active part in the voir dire examination than did the trial court in the case at bar. The trial court in the Bernette case excused prospective jurors on its own cause, whereas the court below merely questioned the jurors as to their attitude toward the death penalty.

Defendant maintains that his confession should not have been entered into evidence for the reasons that he was mentally ill at the time he gave the statement and that he was not represented by counsel. Defendant was found by the jury to have been sane at the time of the commission of the crime. He mistakenly argues that the testimony of Doctor Haines shows that he was psychotic just 6 days before he made the confession. The record, however, shows the doctor's examination took place some 36 days before the commission of the crime. Defendant's attempt to raise the case of Escobedo v. Illinois, 378 U.S. 478, to sustain his contention that the confession was inadmissible because counsel was not present at the time the confession was made is not well taken. People v. Hartgraves, 31 Ill.2d 375. It does not appear that defendant either requested counsel at the time he gave the confession or moved that the confession be suppressed before trial. No evidence exists in the record to show that the confession was other than voluntary.

The confession was read to the jury at the close of all the evidence. This was not error in view of the fact that all of the exhibits, both for the State and for the defense, were read at that time. Defendant's argument that this procedure placed undue emphasis on the confession is negated by this fact. The order in which the exhibits were shown or read to the jury was within the discretion of the trial judge and it does not appear that this discretion was abused or that the reading of the confession to the jury at this time worked any prejudice to the defendant.

Defendant also contends that the evidence concerning his living with another woman was prejudicial in that it introduced the element of the commission of another crime into the case. Defendant contended below that the homicide occurred for the reason that he was emotionally upset because his estranged wife was keeping company with another man and that defendant attempted to see her before the

homicide to tell her of his love for her and to attempt a reconciliation. Although the evidence does tend to prove the commission of another crime, it also shows motive, intent and absence of mistake or accident, and casts grave doubt on the defendant's intent in seeing his estranged wife prior to the homicide. See People v. Harvey, 12 Ill.2d 88, 91.

Defendant maintains that the trial court erred in refusing to admit certain evidence bearing on the question of his sanity. The court properly sustained an objection to the evidence relating to treatments given to defendant after his first conviction, some 9 months after the commission of the crime. While it is true that a mental condition may be a continuous one, and may be shown by an inference that a person was insane at times other than when a crime was committed, there appears to be no definite limit of time within which such prior or subsequent mental condition may be considered by the trier of fact. It is for the trial judge in each case to determine from the circumstances of the case the time period to be considered by the trier of fact as bearing on the question of an accused's insanity at the time of the commission of the crime. See II Wigmore, Evidence, 3d. ed., § 233. The evidence sought to be introduced was evidence of a condition existing some 9 months after the commission of the crime and we are unable to say that the trial court abused its discretion in not allowing this matter into evidence. Defendant also contends that the trial court improperly sustained an objection to Doctor Ziporyn's testimony concerning his conversations with the defendant and also an objection to the submission of certain of defendant's hospital records. The conversations with the doctor took place some 5 years after the date of the crime. The hospital records were likewise many years old and afforded the State little opportunity to cross-examine the doctor in this regard. At no time does it appear defendant was denied an opportunity to testify to these matters in order to create the basis

for a hypothetical question. As a matter of fact, defense counsel was able to formulate a hypothetical question based, in part, upon defendant's own testimony concerning his state of mind. It is well settled that a hypothetical question to an expert witness can be based only upon matters which are in evidence. People v. DeSimone, 67 Ill. App.2d 249.

Defendant contends that the giving of two instructions on the presumption of sanity of an accused was improper, relying upon the case of People v. Munroe, 15 Ill.2d 91. It should be noted at this point that both of the instructions to which defendant now objects were submitted to the jury by the court as defendant's own instructions. The first instruction, defendant's Instruction No. 11, did not conform to the law set out in the Munroe case. The second instruction, defendant's Instruction No. 24, elaborated upon what was set out in the first instruction, and concisely and precisely paraphrased the law set out in the Munroe case.

It was not error to deny defendant's motion for a new trial for the reason that the motion did not allege any new evidence, but set out in a more detailed manner the events which occurred during defendant's commitment. It must be affirmatively shown that the allegedly new evidence was not cumulative of other matters in evidence and could not have been discovered before the trial upon the exercise of due diligence. People v. Mindeman, 318 Ill. 157. While the evidence in question was in the possession of the State during the trial, it appears that the defendant could have procured the evidence upon the exercise of due diligence.

Defendant maintains the sentence of 90 to 120 years was excessive in the light of the circumstances of this case. We agree. Other than commitments to mental hospitals, which obviously cannot be considered in fixing a sentence, defendant had no prior record. This

court has the power to reduce sentences in appropriate cases. Ill. Rev. Stat. 1965, Chap. 38, Par. 121-9(b) (4). The sentence is accordingly reduced to a minimum of 20 years and a maximum of 40 years in the State penitentiary.

We have considered the other arguments raised by defendant and have found them to be without merit.

The judgment is amended by reducing the sentence to a minimum of 20 years and a maximum of 40 years in the penitentiary and as amended is affirmed.

JUDGMENT AMENDED AND AS AMENDED AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.

50850

IGNACIO CHAVEZ, Plaintiff-Appellee, v. ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, a corporation, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

This appeal challenges the propriety of the trial court's vacatur of an order dismissing with prejudice plaintiff's negligence action which plaintiff refiled as a new action on July 19, 1961, pursuant to Section 24 of the Limitations Act. Ill. Rev. Stat. 1965, Chap. 83, Par. 24(a).

Plaintiff's first action was dismissed on August 9, 1960, and defendant was "discharged," due to plaintiff's failure to comply with court rules regarding discovery. The circumstances surrounding the entry of this order are fully set out in Chavez v. Elgin, Joliet & Eastern Ry. Co., 32 Ill. App.2d 68, at pages 70 to 72. Plaintiff challenged the August 9th order by way of a Section 72 proceeding (Ill. Rev. Stat. 1965, Chap. 110, Par. 72) which resulted in a vacatur of that order on November 14, 1960, and a reinstatement of the cause. Defendant thereupon appealed and this Court reversed the November 14th order and reinstated the August 9th order on the ground that plaintiff failed to bring himself within the requirements of Section 72 of the Civil Practice Act. We further held that the November 14th order was final and appealable. (See Chavez v. Elgin, Joliet & Eastern Ry. Co., 32 Ill. App.2d 68.)

Plaintiff, within one year of the August 9, 1960 order, refiled his action pursuant to Section 24 of the Limitations Act, to which defendant filed a motion for summary judgment. Judgment by default was entered for defendant on its motion, due to plaintiff's failure to appear when the motion was called for hearing on December 8,

1961. The default order was later vacated on agreement between the parties to allow plaintiff to be heard. The case was called for trial in October of 1962 and dismissed for want of prosecution when plaintiff again failed to respond to the call. The case was reinstated and plaintiff caused it to be placed on the dormant calendar of the trial court. Defendant's motion for summary judgment was later denied.

The Chicago Daily Law Bulletin printed notices on March 26, 29, 30, 31 and April 1, 1965, that the case would come up for trial on April 2, 1965. On that day plaintiff again made no response to the call and the case was again dismissed for want of prosecution. The Law Bulletin carried notice of this dismissal on April 5, 1965. On June 30, 1965, plaintiff petitioned for and secured a vacatur of the April 2d order and a reinstatement of the cause, from which vacatur and reinstatement this appeal is prosecuted.

The sole question on this appeal is whether the dismissal and discharge order of August 9, 1960, which was a sanction imposed for plaintiff's failure to abide by the rules of court regarding discovery, constitutes a bar to relief under Section 24 of the Limitations Act.

Section 24 of the Limitations Act provides in part:

> "...if the plaintiff has heretofore been nonsuited or shall be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the plaintiff, his or her heirs, executors, or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after." Ill. Rev. Stat. 1965, Chap. 83, Par. 24(a).

The purpose of this section is to facilitate the disposition of litigation upon the merits of the case and to avoid frustration of the action upon grounds which are unrelated to the merits. Roth v. Northern Assurance Co. Ltd., 32 Ill.2d 40. The section is intended to protect a party who brings an action in good faith from complete loss of relief on the merits because of procedural defects. Sachs v. Ohio National

Life Ins. Co., 131 F.2d 134.

We are of the opinion that plaintiff is in no position to avail himself of the remedial provisions of Section 24 in view of the dismissal of his action and discharge of defendant for plaintiff's failure to abide by the rules of court regarding discovery. To permit a party to ignore discovery rules and then to refile his action after it has been dismissed for failure to abide by those rules would serve only to encourage disobedience of court rules and increase problems already existing in our courts. Section 24 is not open to one who is seriously derelict in the performance of his obligations. Involved here is not an involuntary nonsuit as contemplated by Section 24, but a dismissal for sanctions. See Tidwell v. Smith, 57 Ill. App.2d 271; Panion v. Checker Taxi Co., 53 Ill. App.2d 364.

Plaintiff maintains that "no mention whatever is made in [Panion v. Checker Taxi Co., 53 Ill. App.2d 364] about the rights plaintiffs may have had to refile their suits under Section 24 of the Statute of Limitations." The Panion case involved a dismissal of the plaintiffs' actions for failure to comply with a court order to answer interrogatories. The Court in Panion, at page 6 of its unpublished opinion, states in response to a contention by plaintiffs therein that they should have been allowed to refile their actions, "When a suit is dismissed in circumstances such as these, it is clear that a party will not be permitted to refile a complaint based on the same cause of action." The circumstances involved in the dismissal and discharge order of August 9, 1960, are fully set out in Chavez v. Elgin, Joliet & Eastern Ry. Co., 32 Ill. App.2d 68, at pages 70 to 72, and clearly show that plaintiff is barred by his own dereliction from taking advantage of the remedies provided in Section 24 of the Limitations Act.

The order of June 30, 1965, is reversed and the cause is remanded with directions to reinstate the dismissal order of April 2, 1965.

ORDER OF JUNE 30, 1965 REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

BRYANT, P.J., and LYONS, J., concur.

50766

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROBERT DAVIS (Impleaded), Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a conviction for the crime of theft, after a bench trial, with sentence in the Illinois State Penitentiary for a period of from 1 to 3 years.

At the trial, the complainant, Ray Sargent, testified that on December 23, 1964, between 6:30 and 7:00 p.m., he was in O'Donnell's Tavern at 705 North Clark Street; that he had arrived there between 5:00 and 5:30 p.m. in the company of one of his fellow workers, Gene Horrick; that he had a couple of beers with Horrick; that he proceeded down the bar and had a conversation with the bartender; that he was half-sitting and half-standing, at the bar, when he felt his wallet leaving his pocket; that he turned around and saw a man passing his wallet to another fellow; that he saw the face of the man who passed his wallet to the other man and identified him as defendant, Davis; that the man who received the wallet ran out the back door; that he pursued him part way down the alley; that he was not able to apprehend the man; that he returned to the tavern and had a conversation with the bartender; that he and Horrick followed defendant to the tavern next door; that they had a conversation with defendant concerning the taking of the wallet; that defendant denied taking the wallet; that Horrick, defendant and himself walked out of the tavern; that a police officer approached and asked him if his name was Ray Sargent and if that was his wallet; that he answered "Yes" to the questions; and that the wallet was returned to him.

On cross-examination, Sargent testified that defendant was already in the tavern when he entered with Horrick; that there were

30 to 35 people present; that during the time he was in the tavern, he engaged in judo exhibitions with his friend, which included rolling on the floor once or twice; that he does not remember where defendant was during the exhibitions and at the time was not particularly interested; that he never saw his wallet on the floor; that he remembers that his wallet was in his pocket after finishing the judo exhibitions, because he purchased a bottle of beer and used money from the wallet to pay for it; and that the first time the wallet was out of his possession was when he was half-seated at the bar talking to the bartender and he felt his wallet being taken.

Officer John Cello testified that while working a tour of duty at approximately 6:30 p.m. on December 23, 1964, a man ran out of the alley directly across the path of his squad car; that he yelled at the man and gave pursuit; that he identified himself and the man ran off; that he gave chase and apprehended the man; that he searched the man and found a tan wallet belonging to one Ray Sargent; that as a result of the conversation with the man, they went to O'Donnell's tavern; and that on arrival at the scene, they saw defendant and complainant. The following testimony was elicited from Officer Cello:

Q. Who did you see there, when you arrived with the subject?

A. Upon arriving at the scene, we seen the defendant, now identified as Davis, and the complainant, Raymond Sargent, standing out in front.

Q. What was the name of this subject?

A. Amos Murray.

Q. And would you tell the court what he said to you and what you said to him, if anything, in the presence of Mr. Davis?

A. We exited from the car and I says, 'Now, which is the man?' and he pointed to Davis, saying 'That is the man that handed me the wallet.'

Q. And then what did you do, if anything?

A. I talked to Davis and said, 'You're under arrest.' And he said, 'For what?' And I said, 'For stealing the wallet, theft of the wallet, inside the tavern.' He said, 'Not me,' and that was all.

Q. And what did you do if anything, else?

A. We transported both subjects and the complainant into the 18th District, where they were processed and proper charges placed and complaints signed.

Q. Do you see Mr. Davis here in the court room today?

A. Yes, I do.

Q. Will you point him out for the court, please?

A. Sitting there in the gray sweater. (Indicating).

Defense counsel requested that Amos Murray be called as a court's witness but the court denied the request stating that there had been an insufficient foundation laid.

Defendant testified in his own behalf that he had gone to O'Donnell's Tavern on December 23, 1964, arriving around 8:00 p.m.; that he saw complainant performing judo exhibitions; that complainant landed on the floor three or four times; that after one of the exhibitions, he saw someone pick up complainant's wallet off the floor and go out the back door; that someone told complainant "that guy's got your wallet going out the door"; that complainant chased the man; that complainant returned and had a conversation with another person; that he (the defendant) left the tavern and started walking toward a grill in the next block; that complainant and another man stopped him; that complainant told him that he had been told that he had taken his wallet; that he denied this and offered to be searched; that a little later he saw the man whom he saw pick up the wallet and whom he now knows to be Murray with some police officers; that he did not notice if complainant was there; that they said to him, "Let's go"; and that he denied taking the wallet.

Defense counsel again moved the court to call Amos Murray as a court's witness. This motion was again denied on the basis that an insufficient foundation had been laid. The court indicated, however, that defendant was free to call Murray as his own witness.

It is defendant's theory of the case (1) that he was not proven guilty beyond a reasonable doubt (2) that he should have been allowed to call Murray as a hostile witness, and (3) that a hearsay conversation was erroneously admitted into evidence.

In support of his contention, that he was not proven guilty beyond a reasonable doubt, defendant contends (a) that his actions were not those of a guilty man, (b) that the complainant was intoxicated at the time of the offense and therefore, his ability to observe was diminished, and (c) that complainant did not identify defendant as the one who took his wallet, at the time he was first apprehended.

The determination of the credibility of the witnesses and the weight to be given their testimony is the duty of the trial court in a bench trial, and unless the evidence is so unsatisfactory as to leave a reasonable doubt of guilt, a reviewing court will not readily substitute its own conclusion, People v. Boney, 28 Ill.2d 505, 192 N.E.2d 920 (1963). The trial court heard testimony relative to the actions of defendant subsequent to the offense, the intoxication of the complaining witness and his ability to observe the facts and circumstances surrounding him and the failure of the complainant to identify defendant at the time defendant was first apprehended. The court resolved these issues against defendant. After an examination of the record, we feel we should not disturb that result.

We also disagree with defendant's second contention that a proper foundation was laid in requesting Amos Murray to be called as a court's witness. In People v. Moriarity, 33 Ill.2d 606, 615, 213 N.E.2d 516 (1966) the court said at page 615:

> . . . And while subsequent decisions have held that the practice is not limited to the calling of eyewitnesses, (People v. Touhy, 361 Ill. 332, 350; People v. Siciliano, 4 Ill.2d 581, 590,) every decision which has touched upon the subject has counseled that the practice should be sparingly used and restricted to cases where it is shown there might otherwise be a miscarriage of justice. (People v. Johnson, 333 Ill. 469; People v. Laster, 413 Ill. 224;

> People v. Bennett, 413 Ill. 601; People v. Robinson, 14 Ill.2d 325). Further as indicated in People v. Siciliano, 4 Ill.2d 581, 590, a proper foundation must be laid for the calling of a court's witness, which would necessarily consist of the reasons why the party desiring the witness cannot vouch for his veracity, and showing that the testimony of the witness will relate to direct issues and is necessary to prevent a miscarriage of justice. See also: People v. Touhy, 361 Ill. 332, 349; People v. Johnson, 333 Ill. 469, 473.

Twice during the trial, defendant requested that Amos Murray be called as a court's witness. Twice the request was denied on the grounds that a foundation had not been laid. In denying the motion, the court stated, "I see no basis for calling him as a court's witness until there is some showing that you're being caught by surprise or a showing of hostility."

Furthermore, the record clearly shows that defendant had an opportunity to call Murray as his own witness. The court stated:

> You may call him and, then, if the situation develops where you think, in the interest of getting the proof, that it is necessary for you to cross examine, then you can make such a motion, at the appropriate time, and I can rule on it then. But, in the first instance, I do not propose to call Mr. Murray as a court's witness, because I don't believe there has been a sufficient foundation laid at this time.

We feel that the trial court did not err in failing to call Amos Murray as a court's witness.

Finally, we disagree with defendant's contention, that error was committed in admitting the testimony of Officer Cello concerning the conversation between Cello and Murray. There is sufficient evidence in the record to show that the conversation took place in defendant's presence and his failure to deny his guilt, after being pointed out by Murray, amounted to an admission by silence. People v. Smith, 25 Ill.2d 219, 184 N.E.2d 841 (1962).

Furthermore, the case at bar was a bench trial. The court in People v. Cox, 22 Ill.2d 534, 539, 177 N.E.2d 211, 214 (1961), in affirming the conviction where the trial court had admitted incriminating

statements made by a co-defendant in the defendant's presence as admissions by silence said at page 539:

> . . . Since this case was tried by the court, there is a presumption that he considered only competent evidence in reaching his decision. People v. Richardson, 17 Ill.2d 253, 161 N.E.2d 268; People v. Grabowski, 12 Ill.2d 462, 147 N.E.2d 49; People v. Knapp, 15 Ill.2d 450, 155 N.E.2d 565.

The trial judge in the present case, in his comments when entering the finding of guilty, indicated that he was relying on the testimony of the complaining witness in reaching his decision. He did not mention Officer Cello's testimony.

For the above reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and BURKE, J., concur.

78 I.A.2 235

78 I.A.2 120

Filed December 27, 1966 No. 66-102

In The

Appellate Court of Illinois

Second District

OPAL C. CASNER, Plaintiff-Appellee, VS ESTATE OF EVIE L. HAWKINS, Deceased, Defendant-Appellant,	)	Appeal from the Circuit Court of the 16th Judicial District, De Kalb County, Illinois - - Probate Division Honorable Ross E. Millet, Presiding Judge

MR. JUSTICE ATTEN DELIVERED THE OPINION OF THE COURT:

This is an appeal from a Judgment rendered in the Circuit Court of De Kalb County (Probate Division) for the sum of $625.00 on the claim of Opal C. Casner, the Appellee, against the Estate of Evie L. Hawkins, Deceased.

Opal C. Casner was a daughter of the decedent. Her claim in the sum of $1,050.00 was for room, board and nursing services rendered her invalid Mother for the period from July 17, 1965 through September 5, 1965. The Executor of the Estate objected to the allowance of the claim. The undisputed testimony was that a bed was set up for the decedent in the living room of claimant's home, that she was partially bedridden, was physically unable to use the bathroom facilities and that a commode was secured for her use which was kept in the living room next to her bed. That during her stay in the home, the claimant furnished three meals a day in addition to lunches and snacks. She also gave her water and medication, moved things for her, rubbed her back, changed her bed clothing and her gown once a day and did all her laundry. There is likewise no dispute in the testimony concerning the fact that the decedent was business like in her habits and had always paid her bills promptly.

Claimant has filed no Brief and we have, in addition to reading the appellant's Brief and Abstract, read the record. We find therefrom that, although unknown to the claimant at the time the services were rendered, the decedent had disinherited claimant in her will.

In the arguments before the Court below, claimant's attorney admitted the rule to be that there is a presumption that services performed by a close relative are gratuitously performed and that in order to overcome that presumption there must be proof of an express or implied contract whereby the one performing the services expected to be paid and the one receiving the services likewise expected to pay. Heffron -vs- Brown, 155 Ill 322 and Carr -vs- Carr, 43 Ill App 2nd 299. However, counsel argued that in view of the disinheritance the general rule does not apply here and that the proofs in this case were sufficient to sustain the Judgment. We do not believe this position is tenable and hold that the rule enunciated in Heffron -vs- Brown and Carr -vs- Carr, supra, are controlling here.

The record is silent relative to the reason for the disinheritance of the claimant. The decedent's action in this respect may have been prompted by the fact that she favored the claimant with financial assistance during her lifetime, or, it may have been inspired by reasons less laudable. Disinheritance, alone, is not an adequate basis for an exception to the general rule above stated. Therefore, since the claimant has failed to show by any evidence that when the services were performed both parties contemplated that a charge would be made and paid the Court erred in allowing any part of her claim. We need not consider the other points raised by the Executor in opposition to the claim.

The Judgment of the Circuit Court of De Kalb County allowing the claim of Opal C. Casner in the sum of $625.00 is reversed.

Judgment Reversed

SEIDENFELD, J. and DAVIS, J. concur

51523

MARY L. QUINN, Plaintiff-Appellant, v. HAZEL CASHEL, Defendant-Appellee.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from an interlocutory order of the trial court appointing a receiver for a small residential property occupied by plaintiff. Plaintiff brought suit to enjoin defendant from "evicting or threatening to evict" her from the premises. She alleges that a deed in joint tenancy, naming her deceased brother Jerome F. Quinn and the defendant as joint tenants, was in reality a constructive mortgage to secure a purchase loan of $2500 by defendant to the brother; that Jerome F. Quinn was therefore the sole owner of the property, and that as his devisee, she is entitled to the land. In her answer, defendant denies that the payment made by her was a loan to Jerome F. Quinn, and in a counterclaim she asserts that the deed is absolute on its face; that she is the surviving joint tenant and as such is the rightful owner. Defendant filed a motion for judgment on the pleadings and at the same time filed a petition for the appointment of a receiver. Plaintiff filed an answer to the petition on June 6, 1966, and on June 10, 1966, the court ordered that a receiver be appointed without bond.

Plaintiff contends that the appointment of a receiver was improper, in that defendant's petition failed to allege

facts showing the need for such appointment, and she also argues that the trial court erred in dispensing with the requirement that the defendant furnish bond since the court had not held a full hearing as required by the statute which reads as follows:

> "That before any receiver shall be appointed the party making the application shall give bond to the adverse party in such penalty as the court or judge may order and with security to be approved by the court or judge conditioned to pay all damages including reasonable attorney's fees sustained by reason of the appointment and acts of such receiver, in case the appointment of such receiver is revoked or set aside; provided, that bond need not be required, when for good cause shown, and upon notice and full hearing, the court is of opinion that a receiver ought to be appointed without such bond." (Ill. Rev. Stat., ch. 22, § 54 (1965).) (Emphasis added.)

Defendant responds that the facts disclosed by the pleadings and arguments were sufficient to warrant the appointment of a receiver, that the decision to make such appointment is within the discretion of the court, and that in the instant case a receiver was necessary to preserve the property and the rents arising therefrom, and that the bond was not necessary. With respect to the requirement of bond, defendant cites the order of the trial court which reads as follows:

> "That it appearing to this court after notice to the plaintiff and full hearing, that a receiver ought to be appointed without any bond to be given by defendant to plaintiff, for the reasons that plaintiff is in possession of the subject premises notwithstanding defendant's legal record title thereto, and the sums alleged by plaintiff to be due and owing to the defendant constitutes adequate security against any damages occasioned to the plaintiff by reason of the appointment of said receiver, no bond need be executed by defendant as a condition to the appointment of the receiver." (Emphasis ours.)

We agree with plaintiff that defendant's petition fails

to make out a case for the appointment of a receiver. In Wolf v. Greek American Realty Co., Inc., 40 Ill. App. 2d 292, 296, 189 N.E.2d 406,409, the court quoted High on Receivers (4th Ed., pp. 6-7), as to the considerations bearing on the appointment of a receiver:

> "It is a peremptory measure, whose effect, temporarily at least, is to deprive of his property a defendant in possession, before a final judgment or decree is reached by the court determining the rights of the parties.... [S]ince a receivership is a harsh and costly remedy, interfering seriously with the rights of persons in possession, courts of equity exercise extreme caution in the appointment of receivers and withhold the remedy until a proper case has been made therefor."

Defendant's petition wholly fails to set forth any reason justifying the use of such a remedy, and therefore we hold that the appointment of a receiver at this stage in the proceedings was error.

It also appears from the record that the court did not have a full hearing, as its order recites. We can understand the court's conclusion that as plaintiff was admitted to be a mortgagor of the property, there was no need for a bond. That, however, is not the equivalent of a statutory bond in which the recitals of liability for damages in case of a wrongful order are specific and conclusive. A countless number of foreclosure cases are filed in the trial courts of this county and in many of them receivers are appointed, but rarely is bond waived except by agreement.

Order reversed.

Sullivan, P.J., and Dempsey, J., concur.

Abstract only.

51511

OAK PARK NATIONAL BANK, a national banking association, Plaintiff-Appellee, vs. WILLIAM J. KILEY, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

A judgment was rendered in the Circuit Court of Cook County in favor of Oak Park National Bank, plaintiff, and against William J. Kiley, defendant. The judgment was entered on November 5, 1965; a motion to vacate the judgment was filed on behalf of the defendant, and the trial court entered an order denying the motion on March 9, 1966. The defendant then filed a notice of appeal from the order denying the motion to vacate the judgment and from the original judgment.

The notice of appeal was filed on May 5, 1966, which was 57 days after the order denying the defendant's motion to vacate. An amendment to section 76 of the Civil Practice Act [Ill. Rev. Stat. 1965, ch. 110, § 76], effective January 1, 1966, reduced the time for filing a notice of appeal from 60 to 30 days after the entry of the order or judgment appealed from. The statute contained no saving clause with respect to litigation pending prior to January 1, 1966.

The requirement of filing a notice of appeal as provided in section 76 of the Act is mandatory and the statute must be strictly complied with. Freeport Motor Casualty Co. v. Tharp, 406 Ill. 295, 94 N.E.2d 328.

The defendant has filed a motion asking leave to perfect his notice of appeal. Section 76 of the Civil Practice Act also provides that upon petition filed and notice given to the adverse

party within one year from the entry of the order, decree, judgment or other determination, and upon a showing by affidavit that there is merit in appellant's claim for an appeal, and that the failure to file notice of appeal within the 30-day period was not due to appellant's culpable negligence, the court may grant leave to appeal.

The defendant has not complied with section 76; if he complies therewith his petition will be considered by the court. His present motion to perfect the notice of appeal is denied.

APPEAL DISMISSED.

DRUCKER, P.J., and ENGLISH, J., concur.

Publish abstract only.

51685

RAYMOND LAZARICH, Plaintiff-Appellant,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
DELLA ZADEIKA, Defendant-Appellee.	)	COOK COUNTY.

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

A suit was brought by Raymond Lazarich, plaintiff, against Della Zadeika, defendant. After a trial before a jury, a verdict was rendered in favor of the plaintiff and against the defendant for $5,000. The defendant then moved the court for judgment notwithstanding the verdict and further moved the court that in the event the request for judgment notwithstanding was denied, a new trial be granted. The court entered an order granting judgment for the defendant notwithstanding the verdict, but made no final or conditional ruling on defendant's alternative request.

On June 7, 1966, the plaintiff filed his notice of appeal and praecipe for record. On July 26, 1966, plaintiff secured from the trial court an extension of time within which to file the report of proceedings for the certification of the court. The date on which the additional time terminated was September 10, 1966, and on September 13, 1966, the plaintiff presented the report of proceedings to the trial court for certification. The trial court refused to certify it as not being within the time specified and entered the following order:

> "It is hereby ordered that the request of the plaintiff made on September 13, 1966, to approve Report of Proceedings is hereby denied, as the time for filing a Report of Proceedings in this cause expired on September 10, 1966."

In this court the defendant has filed a motion to dismiss the appeal. The plaintiff has filed a motion to extend the time for certifying, approving and filing the report of proceedings and the alternate motion that if the above-mentioned motion is denied, the plaintiff has in effect moved that the material filed by him in this court shall be permitted to stand as a petition for leave to appeal. Rule 36 of the Illinois Supreme Court provides that the report of proceedings at the trial shall be presented to the trial judge for his certificate of correctness, and when so certified shall be filed in the trial court within 50 days after the notice of appeal shall have been filed. There is a further provision that on application made before the expiration of the original or extended period allowed for filing the report of proceedings, the trial court may extend the time for filing the same; however, the extension of time granted in the trial court shall not exceed in the aggregate a period of 45 days from the last day fixed by this rule for filing the report of proceedings. Further extensions of time may be granted only by the reviewing court upon application made within the extended period granted by the trial court, or within any further extended period granted by the reviewing court or judge thereof.

Without an order of the trial court extending the time to file report of proceedings, the plaintiff would have had no standing in court. It is admitted that the order of the trial court extending time to file the report of proceedings had expired September 10, and that all other things being equal, the order of the court denying the certification of the report of proceedings entered on September 13 was proper; however, here the plaintiff argues that since the trial court had failed to rule on the defendant's alternate motion for a new trial

at the time it allowed judgment notwithstanding the verdict, the entire case remained in abeyance until a ruling upon that motion was made. In Fulford v. O'Connor, 3 Ill. 2d 490, 121 N.E.2d 767, at page 501 the court said:

> "It follows, therefore, that the judgment notwithstanding the verdict was erroneous, and must be reversed. Defendants state that we must nevertheless remand the cause so that their motion for new trial may be passed upon by the trial court. It is of course clear that this court cannot pass upon the matters raised by that motion. (Goodrich v. Sprague, 376 Ill.80.) The plaintiff suggests, however, that we may simply enter judgment on the verdict, on the ground that the appellees have waived their right to a new trial.
>
> "Rule 22 of this court provides that when a motion for judgment notwithstanding the verdict is disposed of the trial court shall also pass upon a motion for new trial, if any, made by the movant, and that the ruling thereon will be brought up for review upon the appeal from the judgment n.o.v. The rule also specifies, 'Any party who fails to file a motion for new trial as herein provided shall be deemed to have waived the right to apply for a new trial.' Ill.Rev. Stat. 1953, chap. 110, par.259.22; cf. par. 192; see Todd v. S.S.Kresge Co., 384 Ill.524; Walden v. Chicago and North Western Railway Co. 411 Ill. 378; Langston v. Chicago and North Western Railway Co. 398 Ill.248; cf. Eckhardt v. Hickman, 2 Ill.2d 98.
>
> "In this case, there was no failure to move for a new trial. Plaintiff suggests, however, that defendants waived their rights by failing to obtain a ruling from the trial court. We agree. The purpose of Rule 22 is to prescribe a procedure which will avoid the circuity and delay which formerly prevailed, and we hold that under the rule a party must not only move for new trial but also obtain a ruling on his motion. Todd v. S.S.Kresge Co. 384 Ill.524, 526; Eckhardt v. Hickman, 2 Ill.2d 98, 100; cf.Berg v. New York Central Railroad Co. 323 Ill.App.221, 391 Ill.52, 55."

In Fulford, the court held that the judgment notwithstanding the verdict was erroneous. Therefore the instant case did not remain in abeyance and on the date the trial court refused to certify the report of proceedings the plaintiff was in default, and the ruling of the court was proper. Ticktin v. Verunac, 64 Ill.App.2d 122, 212 N.E.2d 353; Grossi Brothers, Inc. v. Schmidt, 44 Ill.App.2d 228,

194 N.E.2d 557; First Fed.Sav.& Loan v. Oak Park Nat. Bank, 57 Ill. App.2d 477, 207 N.E.2d 79.

Section 68.1(3) of the Civil Practice Act [Ill.Rev.Stat. 1965, ch. 110, § § 1-93] provides:

> "Post-trial motions must be filed within 30 days after the entry of judgment or the discharge of the jury, if no verdict is reached, or within any further time the court may allow within the 30 days or any extensions thereof. A party against whom judgment is entered pursuant to post-trial motion shall have like time after the entry of the judgment within which to file a post-trial motion." [Emphasis supplied.]

The plaintiff did not file a post-trial motion after judgment notwithstanding the verdict was entered against him. He alleges in this court that he did file a motion to vacate the judgment notwithstanding the verdict. The motion is not in the record or in the other papers presented to us, nor is there an affidavit with regard to the motion before this court. We cannot hold that there was compliance with section 68.1(3). No point can be raised on appeal which is not set forth in a post-trial motion. We have no post-trial motion before us.

Section 68.1, par.6, of the Civil Practice Act, makes it mandatory for the trial court to rule upon all relief sought in post-trial motions, but further provides that the conditional rulings become effective only in case the unconditional rulings are reversed or set aside or vacated. Appeal from the final judgment brings up for review the conditional rulings of the trial court without the necessity of a cross appeal. "The reviewing court shall, if it determines that the unconditional rulings were erroneous, review and determine the conditional rulings."

In the case before us, since we have no report of proceedings it is impossible to make any ruling with reference to the propriety of

the trial court entering a judgment notwithstanding the verdict. Since we cannot and do not hold that the entry of the judgment notwithstanding the verdict was invalid, we cannot consider defendant's conditional motion for a new trial. A report of proceedings is necessary to a consideration of the errors relied upon by appellant, and in the absence of such report, there are no questions upon which this court can pass. Lukas v. Lukas, 381 Ill. 429, 45 N.E.2d 869; Johnson Ford Co., Inc. v. Lewan, 71 Ill.App.2d 420, 218 N.E.2d 893; Roberson v. Leak, 72 Ill. App. 2d 11, 218 N.E.2d 819.

Under the view we take of this case there is no necessity for considering the alternative motion of the plaintiff which was in effect that the material filed by him in this court stand as a petition for leave to appeal.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

DRUCKER, P.J., and ENGLISH, J., concur.

Publish abstract only.

78 I.A.2 297

51053

ZYGMUNT LACH, GENOWEFA LACH, Plaintiffs-Appellants, v. ANTON GFESSER, KATHERINE GFESSER, Defendants-Appellees.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY LAW DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Plaintiffs' original complaint sought a declaratory judgment that defendants were acting in violation of a City of Chicago zoning classification by renting residential zoned property for a business use. The complaint further alleged that defendants were liable to plaintiffs for damages to their property resulting from a fire allegedly caused by the business use. Injunctive relief was also sought in the complaint.

Defendants filed a motion to dismiss on the grounds that the complaint stated no cause of action, that it consisted wholly of conclusions and evidentiary facts, and that this was not a proper case for a declaratory judgment. The motion was sustained, the complaint was dismissed, and plaintiffs were given leave to file an amended complaint.

The amended complaint was no substantial improvement over the original complaint; it omitted matters relating to the declaratory judgment and the injunctive relief. Count I of the amended complaint alleged that plaintiffs owned a 2-flat building at 2115 West Moffat Street in Chicago, that defendants owned a 2-flat building at 2113 West Moffat Street, that defendants rented the second floor apartment to Robert Kledzinski, and that they rented the first floor apartment to Ezra Stone, as well as a 2-car garage in the rear of the premises which Stone used as an auto repair shop. Count I also alleged that the existence of the auto repair shop was a violation of the area's residential zoning classification. Count I further alleged that Ezra Stone kept an open can of gasoline on the rear porch of his apartment which he used to clean his greasy hands and arms after leaving the garage and before

entering his apartment, causing the wooden porch to become saturated with gasoline and grease; that defendants knew of this condition and should have known that a continued use of the garage as an auto repair shop would create fire hazards; and that "on... March 17, 1964 a fire occurred and destroyed both 2113 W. Moffat Street and the 2nd floor of 2115 W. Moffat Street, owned by the plaintiffs." Count I finally charged defendants with wilful disregard of the City's zoning classification and that as a result of this wilful disregard plaintiffs' property was damaged. Count II of the amended complaint was identical to Count I and charged defendants with negligence in the rental of their property for an illegal purpose.

Defendants filed a motion to dismiss the amended complaint on grounds, inter alia, that the amended complaint failed to state a cause of action against defendants and that it failed to state where, how, or by whom the fire occurred. The motion was allowed, the amended complaint was stricken, and the suit was dismissed. It does not appear of record that plaintiffs attempted to file a second amended complaint or in any way attempted to cure any of the defects in the amended complaint. They elected to stand on their amended complaint and prosecuted this appeal from the trial court's order of dismissal.

The gist of plaintiffs' contention on this appeal is that they properly pleaded a cause of action against defendants in their amended complaint and that the trial court erred in dismissing the amended complaint. We disagree.

The amended complaint is replete with conclusions. It fails to establish a relationship between the alleged zoning violation and the damage to plaintiffs' property. Nowhere in the amended complaint is there an allegation with regard to where the fire started, how it started, or who started it; the only allegation in this respect is that a fire started on March 17, 1964, which destroyed 2113 W. Moffat Street and the second floor of 2115 W. Moffat Street. The amended complaint

further contains no allegation that plaintiffs were in the exercise of due care for the safety of their property. It must be noted that plaintiffs chose to stand on their amended complaint and to appeal the order of its dismissal; no attempt was made to file a second amended complaint or to otherwise cure the foregoing defects in the amended complaint. The court was right in sustaining defendants' motion to dismiss the amended complaint. See Deasey v. City of Chicago, 412 Ill. 151, 157.

Therefore the judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.

51278

PEOPLE OF THE STATE OF ILLINOIS,
Appellee,
v.
EMANUEL BARKER,
Appellant.

WRIT OF ERROR TO THE CRIMINAL COURT OF COOK COUNTY.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a conviction for murder, after a jury trial, with sentence in the penitentiary for a period of 25 years.

At the trial, there was evidence presented on behalf of the People, which showed that for sometime prior to October 26, 1960, defendant had been carrying on an improper relationship with the wife of Henry Sanders, who lived in the same apartment building as defendant; that Sanders had spoken to the police concerning the matter; that on the evening of October 26th, Sanders returned home and found the doors of his apartment locked; that he heard the voices of his wife and defendant inside the apartment; that he went to the police and asked for their assistance; that Police Officers Henry Pates and William Flowers responded to the call and were entering the building when they discovered that someone was leaving by the rear entrance; that Officers Pates and Flowers accompanied by Sanders proceeded down an alley adjoining the apartment and came upon defendant walking along the side of the building carrying a gun in his right hand; that Officer Flowers approached Barker, holding his official star in his right hand; that Officer Pates identified himself as a police officer and told defendant to put down his weapon; that Officer Flowers tried to grab defendant's gun; that defendant dropped to one knee and fired his gun, fatally wounding Officer Flowers; that Officer Flowers' gun was still in its holster at the time of the shooting; and that Officer Pates, after a chase and gun battle, wounded and apprehended defendant.

The evidence presented by the defense was to the effect that defendant left the apartment building and went into the alley to check his automobile, which had been damaged by vandals several times

in the previous month; that as he started to walk toward the street, he passed three men in the alley, one of whom he recognized as Sanders; that as he stepped into the doorway to enter the building, one of the three, without any warning, fired at him, striking him in the hip and shoulder; and that he drew his own gun in self-defense.

A pathologist testified that the fatal bullet entered through the left armpit and passed diagonally downward through the center of the chest; that the fatal shot was fired from above the deceased; and that there were no powder burns on the deceased. The pathologist also testified that the farther the defendant was from the deceased when the shot was fired, the farther above the deceased (Flowers) the defendant must have been standing. The deceased was six feet tall. Defendant was five feet, three inches tall.

It is defendant's theory of the case (a) that evidence of manslaughter was introduced and it was error for the trial court to refuse to instruct the jury on voluntary manslaughter, (b) that the trial court committed error in not permitting the defense discovery of material portions of a police report, and (c) that the conduct and closing argument of the State's Attorney during the trial prevented defendant from receiving a fair trial.

Defendant's first contention, that there was evidence introduced from which the jury could have found the death of Officer Flowers to have been voluntary manslaughter, is without merit. Defendant argues that the jury might have found that the killing of Officer Flowers occurred while the officer was attempting to make an unlawful arrest without color of authority and that defendant resisted with undue force. People v. White, 333 Ill. 512, 165 N.E. 168 (1929). There is no evidence that any arrest was being made by the officer either with or without color of authority. See People v. Dukes, 19 Ill.2d 532, 169 N.E.2d 84 (1960). The officers were, according to the People's evidence, merely attempting to stop and question a man found

moving along the side of the building holding a gun in his hand. Defendant's evidence did not show that the officers were attempting to arrest him. He testified they commenced firing without saying a word to him.

Defendant also argues that he was shot at first, by the police officer, and returned the gunfire in self-defense. The jury heard the evidence and resolved the issue of who fired first against defendant.

We likewise disagree with defendant's second contention, that he should have been allowed to use police personnel files to show (a) that Officer Pates had been disciplined within the department for making false reports and (b) that Officer Pates had killed two people prior to the date of the instant shooting. It is true that under the rule enunciated in People v. Wolff, 19 Ill.2d 318, 167 N.E.2d 197 (1960), a defendant is entitled to examine the statements of a witness in the possession of the prosecuting authorities to discover any inconsistencies and to use said statements for the purpose of impeaching the witness. The aforesaid rule does not, however, require the police to produce police personnel records.

We have examined defendant's argument concerning the Assistant State's Attorney's conduct and closing summation to the jury and find that no error was committed. For the above reasons the decision is affirmed.

AFFIRMED.

BRYANT, P.J., and BURKE, J., concur.

M-51549

NICHOLAS COLLINI, Plaintiff-Appellee, v. WALTER E. HELLER & COMPANY, a corporation, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY MUNICIPAL COURT SIXTH MUNICIPAL DISTRICT

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

At a bench trial plaintiff recovered a judgment of $2,500 for defendant's alleged fraud in the leasing of a drive-in restaurant. Defendant appeals. Plaintiff has filed no brief in this appeal as required by Supreme Court Rule 39. Ill. Rev. Stat. 1965, Chap. 110, Par. 101.39.

Defendant holds a conditional sales contract involving a trailer and assorted restaurant equipment. The conditional vendee entered a separate lease agreement with the owner of land in Chicago Heights, caused the trailer to be affixed to the land in a permanent manner, and made other permanent improvements in the utility service thereto. The conditional vendee subsequently defaulted on the payments under the contract and defendant repossessed the trailer and equipment.

To minimize losses defendant sought to lease the trailer and equipment. Plaintiff and an associate contacted defendant in this regard and negotiated for a lease. Plaintiff testified that during the negotiations nothing was said concerning the real estate upon which the trailer stood or the fact that defendant was not the owner of the real estate. Defendant's evidence indicates that plaintiff was informed that he would have to secure his own lease to the real estate. All negotiations concerned the trailer and the equipment, and the lease agreement referred solely to the trailer and the equipment, making no mention of the real estate. Attached to the agreement was a schedule of the equipment covered.

Plaintiff's associate refused to sign the lease, and plaintiff signed as sole lessee and returned the lease to defendant

with a $200 security deposit. Plaintiff testified that he did not read the lease before signing it, did not consult an attorney with regard to the lease, did not ask defendant for any indicia of ownership of the real estate, or the like. The first knowledge which plaintiff received that defendant did not own the real estate was when plaintiff sought to exercise his option under the equipment lease to purchase the equipment. Prior to this time plaintiff expended a great deal of money and time improving the trailer and equipment. Plaintiff was thereafter restrained from entering upon the premises under a court order which was entered at the instance of a receiver appointed in connection with the foreclosure of a mechanics lien filed against the land as a result of the improvements previously made to the trailer.

Plaintiff thereafter failed to secure a land lease and defendant returned the $200 security deposit with the notation that the said amount was in full satisfaction of the account. Plaintiff retained the check and neither cashed it nor returned it to defendant. Plaintiff later brought this action to recover for the expenses incurred by him in improving the trailer and equipment.

Defendant maintains on this appeal that plaintiff has made no case against it. We agree.

The basis of plaintiff's amended complaint appears to be that because defendant failed to inform him that defendant was not the owner of the real estate, plaintiff expended time and money for naught. The record shows plaintiff sought no such information from defendant, and we are aware of no duty upon defendant under the circumstances to have volunteered such information. All negotiations revolved around the trailer and equipment, with not one word being mentioned concerning the real estate. Plaintiff, by his own admission, made absolutely no effort to determine who owned the real estate prior to signing the equipment lease. He did not read the lease before signing it, did not

seek legal advice, and did not request any indicia of ownership from defendant. Plaintiff further made no attempt to search the county tract books to determine who owned the land. Plaintiff had no right to assume that the equipment lease included a lease of the land. He alone must bear the burden of failing to protect his own interests. Feldman v. Cipolla, 7 Ill. App.2d 448. Defendant cannot be held to have violated any duty toward plaintiff, especially in view of the fact that plaintiff testified defendant made absolutely no representations concerning the real estate during the negotiations for the equipment lease. See Johnson v. Fulkerson, 12 Ill.2d 69, 75.

It should also be noted that plaintiff's receipt and retention of the $200 check from defendant, "in full settlement of accounts," without any subsequent action on plaintiff's part of avowal or disavowal amounted to an accord and satisfaction. Danks v. Kropp Steel Co., 21 Ill. App.2d 252.

The judgment is reversed and the cause is remanded with directions to enter a judgment for the defendant and against the plaintiff.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

BRYANT, P.J., and LYONS, J., concur.

18 I.A.2 336

50628 and 50629

PEOPLE OF THE STATE OF ILLINOIS, Appellee,	)	
v.	)	APPEAL FROM THE CIRCUIT COURT CRIMINAL DIVISION
WILLIE CLARK and GERALD JENKINS, Appellants.	)	

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from verdicts and judgments of the Circuit Court of Cook County finding the appellants guilty of the crime of burglary. Appellant Willie Clark was sentenced to 10 to 20 years, and appellant Gerald Jenkins was sentenced to 15 to 25 years in the Illinois State Penitentiary. In this court the matters were consolidated for appeal. Appellants raise three issues on this appeal: 1. the court erred in restricting cross-examination; 2. the court failed to properly instruct the jury; and 3. the prosecution's misconduct deprived the appellants of a fair trial.

The facts of this case are as follows: At 3:30 in the morning on August 20, 1964, Chicago Police officers Francis Evans and Fred Washington, received a burglary-in-progress report. They drove to Zales Ice Cream Parlor and Sandwich Shop at 1051 E. 43rd Street in the City of Chicago, and parked the car in front of the store. The officers saw the appellants in the well-lighted store, where they were lying on the floor. Appellants raised up and saw the two officers through the window; appellants then ran out the back of the store. The officers split up and entered the alley back of the store from two different directions, where they each apprehended one of the appellants. Appellant Jenkins was taken back to the store, where he admitted that he had been inside the store. At the trial officer Washington identified appellant Clark and testified that the appellant was wearing clothing when he was arrested which was similar to that of the man seen by the officers in the store. Officer Washington further testified that appellant

Jenkins stated that he had been inside the store.

Appellants' first contention is that the trial court erred in restricting the cross-examination of Officer Washington. The disputed testimony is as follows:

"Defense Counsel: Q. ...Did you or did you not observe the hot dog and if so what did he do with the hot dog?

Officer Washington: I am positive that he was eating it, but I don't know whether the red hot, the frankfurter itself was in the bun or was in his pocket, but he was eating.

Q. What did he do with the hot dog that was in his pocket?

State's Attorney: I object.

The Court: Objection sustained. The jury will disregard counsel's question on presumptions purely to create some impression on the jury.

Defense Counsel: The witness testified to a hot dog. This isn't inflammatory.

The Court: That isn't the point counsel. Your question and the inference that you are trying to raise is going--is inflammatory and I will ask the jury to disregard it."

It is the contention of the appellant that the trial court thereby cut off cross-examination of a material item. Appellant moreover, claims that his defense counsel was disparaged in front of the jury for doing his job as a lawyer.

It is clear that the law in this state is that the latitude allowed on cross-examination in a criminal proceeding rests in the sound discretion of the court, and the rulings of the court in respect thereto will not be disturbed in the absence of a clear abuse of such discretion. People v. Moretti, 6 Ill.2d 494, 129 N.E.2d 709; People v. Derrico, 409 Ill. 453, 100 N.E.2d 607; People v. Provo, 409 Ill. 63, 97 N.E.2d 802. While the trial court might have properly allowed counsel for appellant to pursue this line of examination, we cannot

say that the refusal to have done so was error. Nor is there any hint of disparagement of the defense counsel by the trial court.

Appellants' next contention is that the trial court failed to properly instruct the jury. The instructions in issue are one relating to alibi and one on circumstantial evidence. They are as follows:

DEFENSE INSTRUCTION NO. 6

"If a person on trial for a crime shows that he was in another place at the time when the act was committed, he is said to prove an alibi.

Such defense is proper and all evidence bearing on that point should be carefully considered by the jury. If in view of all the evidence, the jury believe the defendant was in some place other than where the crime was committed at the time the crime was committed, or if the jury have a reasonable doubt of his presence when and where the crime was committed, they should give the defendant the benefit of the doubt, and find him not guilty.

As regards the defense of an alibi, the jurors are instructed that the defendant is not required to prove that defense beyond a reasonable doubt to entitle him to an acquittal. It is sufficient, if the defense upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged, and if it does, it is your sworn duty under the law to give the benefit of the doubt to the defendant and to find him not guilty."

and

DEFENSE INSTRUCTION NO. 2

"The court instructs the jury that if there are two theories which may lawfully be drawn from the evidence, one pointing to guilt and the other to absence of guilt, they should find the defendant not guilty."

It is of course clear that if there is any evidence in the record tending to prove an alibi, the trial court should give a proper instruction on that issue. People v. Johnson, 317 Ill. 430, 148 N.E. 255; People v. Thompson, 321 Ill. 594, 152 N.E. 516; People v. Leving, 371 Ill. 448, 21 N.E.2d 391. A search of the record reveals that the appellants were caught in the vicinity of the burglary. While both appellants made statements to the effect that they were not in the store; appellant Clark testified that he was in the alley to urinate, and appellant Jenkins stated that he had just left home at 3:30 A.M. to buy some ribs, we do not feel that the statements of the appellants

(especially in view of Jenkins' previous admission that he was in the store) were sufficient to warrant the trial court giving an instruction on alibi. No one else who could have substantiated the claimed alibis testified in behalf of the appellants.

The court likewise was correct in refusing to give the appellants' instruction No. 2. That instruction is applicable only when opposing theories as to guilt or innocence arise out of the same facts. People v. Maffoli, 406 Ill. 315, 94 N.E.2d 191. In this case the defenses of appellant Clark and appellant Jenkins do not arise out of the same facts as the theory advanced by the prosecution, but out of the wholly unrelated facts that they were not there.

The final contention that appellants raise on this appeal is that misconduct by the prosecution deprived the appellants of a fair trial. Specifically, the appellants contend that they were prejudiced by the introduction into evidence of their past records. Both appellants volunteered information concerning their prior convictions on direct examination. On cross-examination the prosecution did not ask about the prior convictions, but instead introduced an authenticated copy of the record which was admitted into evidence. Prosecution then read details of the convictions.

The action of the prosecution was not prejudicial towards the appellants. Chapter 38, §155-1, Ill. Rev. Stat. 1965, specifically authorizes the introduction of a prior conviction to affect the credibility of a witness. And in this case it was the appellants who first brought up the issue of their prior misdeeds. As to appellant Jenkins in particular, it is contended that the fact convictions in 1946 and 1951 were too remote and that their value was outweighed by the prejudice to the appellants. Appellants' reliance on People v. Henneman, 323 Ill. App. 124, 54 N.E.2d 745 is not well placed. In that case it was held to have been error for the court to have admitted evidence of a conviction occurring some twenty-one years

before the trial of the second offense. In the present case, the 1946 conviction of Jenkins was succeeded by a string of convictions leading up to the present one for burglary. Jenkins himself testified that he had been in trouble all of his life. Under the circumstances we cannot say that the actions of the prosecution in injecting the prior records of the appellants into the case was prejudicial to the rights of the appellants.

For the above reasons the judgments are affirmed.

JUDGMENTS AFFIRMED.

LYONS, J., and BURKE, J., concur.

78 I.A. 2 337

50772

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. WHITSON S. WEST, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY COUNTY DEPARTMENT CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

In a trial without a jury on a charge of raping a 16 year old girl defendant was found guilty of the lesser included crime of attempt to commit rape and sentenced to 1 to 5 years in the penitentiary. He appeals.

Defendant maintains that the testimony of the prosecuting witness was neither clear nor convincing, nor was it corroborated by other, independent facts. In the alternative, defendant contends that the element of specific intent to commit rape was not established.

The prosecuting witness, Linda O'Connor, testified that on April 7, 1964, she resided with her family in Orland Park. She stated that she was a victim of cerebral palsy since birth and that the affliction affected her legs which at times limited her ability to walk. Defendant, a man 54 years of age, weighing 180 pounds and standing 6' 1" in height, was a blacksmith by trade. At times he lived in his automobile across the street from the O'Connor residence on the property of Mrs. Helen Worley.

Approximately 2:00 P.M. on April 7th, defendant's dog bit one of Linda's younger brothers in the face and Linda's mother took the child to the hospital for treatment. Linda put her baby brother to bed and proceeded to the kitchen where she came upon defendant with one of the Worley children, a 3 year old boy. At this point the telephone rang. It was Linda's mother calling from the hospital and after a short conversation Linda hung up the telephone and told defendant to leave the house. Defendant stated that Linda's mother knew he was there. Defendant then began to embrace Linda. She testified she smelled liquor

on his breath. Linda fought him off until she was knocked to the floor, whereupon defendant picked her up and they continued to struggle until Linda became weak. Linda testified she clawed at defendant, and took a knife from the kitchen sink and cut his wrist, after which defendant disarmed her and carried her into the front room where he placed her on a couch. Linda screamed and fought defendant as defendant disrobed her. Linda's baby brother then began to cry and Linda requested defendant to allow her to go to him, but defendant refused. Defendant then asked Linda if it was her "first time with a man or a boy doing this," to which Linda replied "yes." Defendant then stated, "Well, it will be your first time with me." Linda testified that defendant then held her two hands above her head and attempted to have intercourse. Linda freed one of her hands and gouged defendant's ear with her fingernails.

At this point the telephone again rang. Defendant allowed Linda to answer it, threatening her with harm if she said anything of what had occurred. The time was approximately 3:20 P.M. and the call was from Linda's mother at the hospital. Mrs. O'Connor wanted to know if defendant was there, asked to speak with him and requested him to pick up the children from school (as he had done several times in the past.) Defendant left with the Worley boy and Linda immediately telephoned her mother at the hospital. She was unable to reach her mother and left word for her mother to telephone back. Linda then telephoned Mrs. Worley and asked her to come over. Mrs. Worley and her 16 year old son, Richard, went to the O'Connor residence and Linda related to them what had occurred. Linda's mother later telephoned from the hospital and Linda told her that defendant had raped her. When defendant returned at approximately 3:45 P.M. with the children, Linda became hysterical and told him to leave. Defendant and the Worleys left and went to the Worley residence. Linda was later examined by a doctor but the report was not entered into evidence.

Mrs. Worley testified for the defense and stated she and defendant had been drinking at her home during the morning of April 7th until approximately 1:00 P.M. She stated she saw defendant walking toward the O'Connor residence about 2:00 P.M. and received a telephone call from Linda O'Connor shortly after 3:00 P.M. requesting her to come to the O'Connor residence. Mrs. Worley and her son went to the O'Connor home and Linda related to them what had occurred. She testified that Linda was hysterical, crying and incoherent. Defendant later entered the O'Connor residence and Linda ordered him to leave. Defendant and the Worleys went to the Worley home. Mrs. Worley related to defendant what Linda told her and defendant left.

It was stipulated that, if called as a witness, Richard Worley would testify the same as Mrs. Worley.

Mrs. O'Connor testified that she received a message at the hospital to telephone Linda and when she did Linda stated that defendant had raped her.

Cook County Sheriff's Police Officer Robert Erickson investigated the incident and testified that defendant had fresh wounds on his wrist and ear and that his breath smelled of alcohol.

Defendant testified in his own behalf and stated he lived in Lemont and was employed as a blacksmith. He spent the night of April 6th and 7th in his automobile on the Worley property. On April 7th his dog bit one of the O'Connor boys and at approximately 1:30 P.M. Mrs. O'Connor took the child to the hospital for treatment. Defendant and one of the Worley boys thereafter went to the Worley garage where they fed defendant's donkey, immediately after which defendant and the boy went to Tinley Park and to Frankfort where defendant was to work on some horses. They returned to Orland Park approximately 3:45 P.M. Defendant went to the O'Connor residence and Linda answered the door. Defendant asked if Linda heard anything from her mother. At that

point Mrs. O'Connor telephoned and requested defendant to pick up the children from school. When defendant returned to the O'Connor residence approximately one half hour later with the children, Linda became hysterical and defendant left. He went to the Worley home where he was later told by Mrs. Worley that Linda accused him of raping her. Defendant denied the charge and stated that Linda should see a doctor to prove she was not raped. Defendant later contacted a doctor and then the police.

Defendant's first contention, that the testimony of the complaining witness was neither clear nor convincing and was not corroborated by any independent evidence, is without merit. Defendant argues that the prosecuting witness invented the entire story due to her inability to have a normal, active social life. This does not appear to be the case after a reading of her testimony which shows that she gave a clear and convincing account of the incident and which bears out the trial court's comment that "I believe this little girl implicitly. I think she told a straight-forward story." It is well settled that the testimony of a complaining witness alone is sufficient to sustain a conviction if the testimony is clear and convincing. People v. Reaves, 24 Ill.2d 380, 382; People v. Mueller, 2 Ill.2d 311, 313.

The testimony of the complaining witness was further corroborated by independent evidence. Immediately after the defendant left the O'Connor residence after the incident, Linda telephoned both her mother and Mrs. Worley and made complaint to both women. Her testimony was further corroborated by three other witnesses. Mrs. Worley, a witness for the defendant, stated that she saw defendant walking in the direction of the O'Connor residence approximately 2:00 P.M. on April 7th, which was approximately the time Linda found defendant standing in her kitchen. Defendant, however, stated that he was on his way to Tinley Park prior to this time, contradicting his

own witness in this regard. Linda further testified she smelled liquor on defendant's breath when he attacked her. Officer Erickson likewise testified that defendant's breath smelled of liquor, and Mrs. Worley testified that she and defendant had been drinking earlier that day. Mrs. Worley testified to Linda's distraught condition after she was summoned to the O'Connor home, which condition was corroborated by defendant's own testimony that Linda "throwed a fit and went to crying and squawking" when he entered the O'Connor home after picking up the children. Officer Erickson further corroborated Linda's testimony that she slashed defendant's wrist and gouged his ear during the incident.

The variances in the evidence alluded to by defendant are either explainable or are insignificant in the light of the evidence as a whole. See People v. Thomas, 18 I11.2d 439, 442-444. Defendant maintains the fact that Linda's clothes were intact at the time she was observed by Mrs. Worley after the incident discredits Linda's testimony concerning the struggle which had taken place during the incident. However, Linda testified that she cleaned herself up and put on a shift dress before Mrs. Worley arrived. The fact that the hospital report was not entered into evidence bears only on the question of whether the act of rape had been completed. Defendant was found guilty of attempt to commit rape. If, as defendant speculates, the report showed no bruises then defendant should have had the report admitted into evidence as part of his case. Defendant also argues that it is unbelievable that a rapist would allow his intended victim to answer the telephone while the rape was in progress, as was testified to by Linda. However, this is not so incredible in view of the fact that Linda's mother had telephoned her earlier while defendant was present. It is reasonable that defendant feared the second telephone call was likewise from Linda's mother and that the latter would become alarmed if there was no answer in view of Linda's

condition of cerebral palsy. The fact that Linda did not complain to her mother during that telephone conversation is answered by defendant's threat that he would harm Linda if she said anything.

Defendant's second contention, that the State failed to prove a specific intent to commit rape, is likewise unavailing. Defendant's amorous advances toward Linda; his carrying her to the couch in the front room; Linda's struggle and her infliction of wounds upon the wrist and ear of defendant; defendant's questioning whether it was Linda's first time with a man and his comment that it would be her first time with him; and defendant's holding Linda's arms above her head and attempting to have intercourse, all lead inescapably to the conclusion that defendant had the intention and was attempting to have intercourse with Linda by force and against her will.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.

51057

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
JACK KAMSLER,
Defendant-Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY
CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was tried with Allan Solomon, found guilty by a jury of theft of a quantity of metal valued over $150 and sentenced to 2 to 6 years in the penitentiary. He appeals. Solomon is not involved in this appeal.

On June 5, 1962, Mr. Ronald Skinner, a salesman for M.F.I. Corporation (Metals for Industry), spoke to defendant over the telephone. Defendant stated that he was associated with the Empire Outdoor Advertising Company and that he needed a quantity of aluminum for the construction of outdoor signs. Skinner checked and found the Dun and Bradstreet credit rating of Empire Outdoor to be good and released some $886 worth of aluminum on open account. Additional aluminum was released at defendant's request on June 6th, 8th and 13th, totaling some $2,600.

The Dvorak Trucking Company, acting for Empire Outdoor and defendant, picked up each order of aluminum from M.F.I. and delivered the aluminum immediately to the following steel companies: D. & L. Steel received two shipments and remitted checks of $604 and $513 to Empire Outdoor; Ace Steel and Supply received one shipment and remitted a check of $281 to Empire Outdoor; Adams Steel and Magnet received one shipment and remitted a check of $540 to Empire Outdoor. M.F.I. never received payment from Empire Outdoor on any of the four aluminum sales, and after a period of time Skinner contacted the State's attorney's

office regarding the matter.

Over objections of the defendant, the State was permitted to introduce evidence of 8 prior transactions involving defendant and four other metal companies. In each of the prior transactions defendant purchased metal from a steel company and caused delivery of the metal to be made directly to one of his buyers. The buyer in each instance was charged substantially less than the price defendant agreed to pay the seller, and the seller never received payment in any of the transactions.

Catherine Rogers of the Southmoor Secretarial Service testified that she knew defendant and Allan Solomon. She stated she had performed telephone answering services for them under the title of Empire Manufacturing and Empire Advertising from autumn of 1961 until July 20, 1962. She further testified that defendant used the name "Dick Conlon" on several occasions. It was stipulated that Irving Nudleman, the owner of a currency exchange, would testify that defendant cashed checks from various steel companies payable to Empire Outdoor. He would further testify that he knew both defendant and Solomon to be the owners of Empire Outdoor.

Defendant advances several grounds for reversal on this appeal: that the statute under which he was found guilty is ambiguous; that, even if not ambiguous, the statute has no application under the facts of this case; that the indictments under which defendant was tried do not specifically set out the crime with which he was charged; that defendant was placed in double jeopardy in that he had been previously convicted of a similar offense; that none of the complaining witnesses appeared before the State's attorney in the interest of justice, but rather sought to use the process of the Criminal Court to collect private debts; and that the sentence imposed upon defendant is unjust under the circumstances.

Defendant first maintains that Sections 15 and 16 of the

Criminal Code of 1961 are vague, and cites the definition of "owner" set out in Section 15-2 of the Code as being repugnant to Section 16. Ill. Rev. Stat. 1963, Chap. 38, Pars. 15 and 16. Section 16-1 of the Criminal Code of 1961 defines "theft" as follows:

> "A person commits theft when he knowingly:
>
> (a) Obtains or exerts unauthorized control over the property of the owner; or
>
> (b) Obtains by deception control over property of the owner; or
>
> (c) Obtains by threat control over property of the owner; or
>
> (d) Obtains control over stolen property knowing the property to have been stolen by another, and
>
> (1) Intends to deprive the owner permanently of the use or benefit of the property; or
>
> (2) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or
>
> (3) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit." Ill. Rev. Stat. 1963, Chap. 38, Par. 16-1.

Section 15-2 of the Criminal Code of 1961 defines "owner" as follows:

> "As used in this Part C, 'owner' means a person, other than the offender, who has possession of or any other interest in the property involved, even though such interest or possession is unlawful, and without whose consent the offender has no authority to exert control over the property." Ill. Rev. Stat. 1963, Chap. 38, Par. 15-2.

After paraphrasing the wording of Section 15-2, defendant maintains that under Section 15-2 an owner can never be an offender, that under the facts herein defendant was the owner of the goods in question, having purchased them on open account under the usual and customary terms of business, and that he consequently cannot be considered an offender within Section 15-2 of the Code. Section 15-2 of the Code is not repugnant to Section 16. Section 15-2 does not say that an owner of goods can never be an offender; it merely defines the parties involved in any given fraudulent transaction. In each transaction there

is an "owner" and an "offender," who in this case are M.F.I. and defendant, in that order. Furthermore, in the case of People v. Kamsler, 67 Ill. App.2d 33, this Court considered indictments drawn directly from Sections 15 and 16 and found them to have been drawn to the degree of clarity necessary to protect defendant's rights. The meaning of the two sections is clear and the two sections are consistent with each other.

Defendant maintains his plan of acquisition of the aluminum through false promises of future payment is not an indictable offense under the theft statute. This proposition is untenable. As we stated in the case of People v. Kamsler, 67 Ill. App.2d 33, at page 43:

> "The State proved, one, that defendant created a false impression that he was a sign manufacturer, two, that defendant obtained control over the steel, and immediately sold the steel at a reduced price to a bonafide purchaser and three, that defendant's promise to perform, that is, pay for the steel, was so consistently broken as to show conclusively that defendant never intended to perform."

This Court then went on to state that "defendant committed theft in that he intended to, and did, obtain and deprive an owner of his property, by false promises of performance."

Defendant relies on the case of People ex rel. Ellis v. Healy, 128 Ill. 9, as standing for the proposition that a promise in futuro, accompanied by an intent not to keep said promise, cannot be considered criminal. The Healy case does not so hold. The Healy case was a mandamus action for the issuance of an alias capias ad satisfaciendum and held that a promise in futuro accompanied by an intent not to keep said promise is only a breach of contract and will not support an action for fraud and deceit. Nothing whatsoever was said concerning the criminality of an attempt to make a regular practice of such activity as defendant attempted to do here.

Next defendant contends the indictments under which he was found guilty should have been declared void for the reason that they did not give him enough information to enable him to prepare a defense.

A similar contention was made in the case of People v. Kamsler, 67 Ill. App.2d 33, with regard to similarly drawn indictments and this Court found that the offenses were properly charged in the language of the statute and that the words used particularized the offenses. The indictments here adequately notified defendant of the charges against him. See also People v. Krause, 291 Ill. 64.

Defendant's contention that he was placed in double jeopardy in that he was tried for a similar crime in People v. Kamsler, 67 Ill. App.2d 33, is unfounded. He maintains that, under Section 3-3 of the Criminal Code of 1961, the two offenses should have been tried together and that Section 3-4 of the Code bars the present prosecution. Ill. Rev. Stat. 1963, Chap. 38, Pars. 3-3 & 3-4. Section 3-3 provides that several offenses must be prosecuted in a single prosecution if those offenses are known to the prosecuting officer at the time of the commencement of the prosecution and if those offenses are within the jurisdiction of a single court, if they are based upon the same act. (Emphasis by Court.) The crux of the question is therefore whether the offenses charged should have been prosecuted in a single prosecution. People v. Mullenhoff, 33 Ill.2d 445. The offenses for which defendant was tried were not based "upon the same act" as Section 3-3 contemplates. The proceeding in the case at bar and the proceeding in People v. Kamsler, 67 Ill. App.2d 33, involved different victims, different transactions, different periods of time and different objects of theft. There was neither the identity of occurrence nor the similarity of conduct on the part of the defendant for the provisions of Sections 3-3 and 3-4 to be applicable. (See People v. Golson, 32 Ill.2d 398, 411.)

Defendant maintains that the prosecuting witnesses did not appear before the State's attorney in the interest of justice or public welfare, but used the process of the Criminal Court to collect private debts. This charge is completely unfounded and unsubstantiated

by the record. Defendant further cites no instance in support of this allegation.

Defendant also maintains that his instruction relating to the definition of "owner" in Section 15-2 of the Criminal Code should have been given to the jury. The instruction was refused, no objection was made to the ruling, and consequently the matter is waived. People v. Trefonas, 9 Ill.2d 92, 98. Furthermore, the instruction employed the same reasoning as that employed in defendant's argument that Sections 15 and 16 of the Criminal Code are vague and repugnant to each other, which has been dealt with above.

Defendant contends that the sentence imposed upon him was exceedingly harsh, considering the crime for which he was found guilty. We disagree. In view of defendant's prior conviction of a similar crime and in view of the evidence against him with regard to the scheme in which he was engaged to defraud innocent merchants, we are of the opinion that a sentence of 2 to 6 years in the State penitentiary is not harsh.

We have considered the other contentions raised in defendant's brief and found them to be without merit.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.

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Filed December 27, 1966

No. 66-91

In The

Appellate Court of Illinois

Second District

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, VS EDWARD EUGENE MERRILL, Defendant -Appellant,	)	Appeal from the Fifteenth Judicial Circuit in the Circuit Court of Lee County, Case No. 66 CR 288
	)	Honorable Edward J. Turnbaugh Presiding Judge

MR. JUSTICE ATTEN DELIVERED THE OPINION OF THE COURT:

The appellant was tried and convicted on March 31, 1966 for his participation in the burglary of the Lee County Grain Elevator office building on or about August 7, 1965.

He was arrested at about 7:00 p. m. on September 28, 1965 by Illinois State Police Officers Robert L. Bales and Robert Wise, was taken directly to the Ogle County jail, and Officer Bales there told him that he did not have to talk to anyone and gave him the opportunity to call an attorney. He chose not to call a lawyer.

Sheriff William E. Spencer took custody of the appellant when the latter arrived at the jail. Sheriff Spencer immediately told him that he did not have to talk to anyone; that if he did say anything, it would be used against him and that he had a right to an attorney. He was thereafter locked up and conversed with no one until around midnight. Between midnight and 1:00 a. m. the appellant was brought to the Sheriff's office and again advised that he did not have to say anything; that what he did say would be used against him; and that he could have the services of an attorney. At this time the Sheriff and the State police

officer were discussing a list of burglaries and participants. The defendant asked and was granted permission to inspect this list. When shown the list he said, "I know I shouldn't say anything to you, but I am going to anyway." He took the list, looked it over and advised the Sheriff that it was correct, and also voluntarily made statements adding a substantial number of other burglaries to this list, including that of the Lee County Grain Association.

The Motion to Suppress the oral confession was denied. At the trial the officers and the Sheriff testified to Appellants oral confession; in addition thereto one of the alleged accomplices testified in detail as to the crime.

Appellant contends that in accordance with the guide lines established by the case of Miranda -vs- State of Arizona, 16 Led 694; 86 SCt 1602, the officers violated his constitutional privilege by compelling him to answer questions after invoking his right to remain silent.

This case was tried in the Circuit Court of Ogle County on March 30th and 31st, 1966. The Miranda decision was announced on June 13, 1966, and the United States Supreme Court in the case of Johnson -vs- New Jersey, 384 US 719, 16 Led 882, 86 SCt. 1772, held that the guide lines set out in the Miranda case are only available to persons whose trial began after June 13, 1966. The Illinois Supreme Court held in nine decisions during the September, 1966, term of Court that the Miranda decision is not to be applied retro-actively.

People v John E. Meyers, 35 Ill 2d 311, Docket No. 39778
People v Jackson, 35 Ill 2d 162, Docket No. 38051
People v Thomas, 35 Ill 2d 388, Docket No. 38464
People v Heise, 35 Ill 2d 214, Docket No. 38678
People v Ostrand, ___ Ill 2d ___, Docket No. 39066
People v Le May, 35 Ill 2d 208, Docket No. 39150
People v Wallace, 35 Ill 2d 251, Docket No. 39288
People v Williams, ___ Ill 2d ___, Docket No. 39515 & 39524
People v McGuire, 35 Ill 2d 219, Docket No. 39531

In view of these pronouncements this Court finds the Miranda decision does not apply here. We further find that the defendant's oral confession was voluntarily made and that it does not violate the provisions of Sec. 103-2 (a) and (b) of the Criminal Code (Ill. Rev. Stat. 1965, Ch 38 par 103-2) The judgment of the lower court is therefore affirmed.

Judgment Affirmed

SEIDENFELD, J. and DAVIS, J. concur

49907

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RONALD TUCKER, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a jury trial of rape and burglary. He was sentenced to 10 to 25 years in the State penitentiary for the burglary and 45 to 60 years for the rape, the sentences to run concurrently. He appeals.

Defendant maintains on this appeal that prejudicial error was committed by the trial court's refusal to allow him access to the transcript of testimony of the prosecuting witness before the grand jury and by the trial court's refusal to compel the State to produce a pre-trial statement given by the prosecuting witness to an assistant State's attorney.

Approximately 3:00 A.M. on October 16, 1961, Mrs. Paula Eisenhammer, the prosecuting witness, was alone in her home in Chicago with her two children, her husband having gone to the airport to pick up his mother. Two men, one of whom Mrs. Eisenhammer later identified as defendant, entered the bedroom where Mrs. Eisenhammer was sleeping and bound and gagged her. The men raped her three times, ransacked the bedroom, front room and dining room, and fled with several items of Eisenhammer personal property. Mr. Eisenhammer later returned home and found his wife still bound, gagged and almost completely nude, and notified the police. Defendant was arrested in his apartment on December 26, 1961, and a subsequent search of the apartment revealed a cigarette case belonging to Mrs. Eisenhammer which was taken in the October 16th burglary. Defendant was identified at a police line-up by Mrs. Eisenhammer later that day as one of the assailants.

On cross-examination of Mrs. Eisenhammer it was brought out

that she testified at the grand jury hearing. A motion was made that the defense be allowed access to her testimony before the grand jury for possible impeachment purposes, but the motion was denied. It is conceded by the defendant that the State made no attempt to use the grand jury minutes when Mrs. Eisenhammer was on the stand at trial. Defendant further made no showing that the minutes would in any way aid him.

Defendant also ascertained that Mrs. Eisenhammer gave a statement to an assistant State's attorney prior to trial. Detective Jack Wallenda, the arresting officer, testified that he was present when Mrs. Eisenhammer gave her statement to the assistant State's attorney and that he believed it was not reduced to writing; Mrs. Eisenhammer stated she could not remember whether the statement was reduced to writing. The State made a search for such written statement, but to no avail. The defendant requested production of the statement, which was not honored, and then moved that Mrs. Eisenhammer's testimony be stricken, which was denied.

Defendant offered no evidence in his behalf.

Defendant first maintains the trial court erred in denying him access to the transcript of testimony of Mrs. Eisenhammer before the grand jury, under the authority of People v. Johnson, 31 Ill.2d 602. We disagree. In the Johnson case the Court found inconsistencies and improbabilities in the testimony of the prosecuting witness and other State's witnesses, which is not true in the instant case. The facts testified to by Mrs. Eisenhammer at trial are consistent with each other and with the matters testified to by the other witnesses. Furthermore, the State made no use of the grand jury minutes at the trial. It should also be noted that the State has filed in this Court an authenticated copy of Mrs. Eisenhammer's testimony before the grand jury. A comparison of the grand jury testimony and the trial testimony reveals the two to be consistent. Since nothing contained

in the grand jury minutes would have afforded defendant grounds for impeaching Mrs. Eisenhammer, defendant was in no way prejudiced by the court's refusal to allow him access to the minutes. See People v. Velez, 72 Ill. App.2d 324, 333-334.

Defendant maintains that the statute in effect at the time he was tried, permitting the disclosure of certain portions of grand jury minutes, was unconstitutional in that it in effect prohibited a defendant from employing the minutes for impeachment purposes unless the State's attorney first employed them in the examination of a witness. (See Ill. Rev. Stat. 1963, Chap. 38, Par. 112-6(b).) The constitutionality of the statute is not involved. A court has always had the discretion to allow access to pre-trial statements of witnesses upon request of a defendant where he makes a showing that the statements would aid him in his defense. (See People v. Johnson, 31 Ill.2d 602, where the Supreme Court held it was error for the trial court to deny the defendant's motion for access to a witness' grand jury testimony where there were inconsistencies and improbabilities in the testimony of the State's witnesses.) Defendant here made no showing whatsoever that the transcript of Mrs. Eisenhammer's grand jury testimony would have in any way aided him. Defendant's citation to the case of Brady v. Maryland, 373 U.S. 83, as standing for the proposition that a defendant is ipso facto entitled to inspect the grand jury testimony of a trial witness, is misplaced. In the Brady case defendant pleaded guilty to a charge of murder, but maintained that his accomplice did the actual killing and requested a copy of the confession of his accomplice at the hearing in mitigation. The State failed to produce a copy of the confession and the Supreme Court held this to be error. The defendant in the Brady case made a showing that the confession would help him; here, defendant made no such showing.

Defendant finally contends that he was prejudiced by the State's failure to turn over a copy of the statement Mrs. Eisenhammer gave to the assistant State's attorney before trial. We disagree. Mrs. Eisenhammer testified that she could not remember whether the statement she gave was reduced to writing, and Officer Wallenda testified he believed the statement was not reduced to writing. The State made a search for such statement, but to no avail. Under the circumstances the State could not give defendant which it did not have in its possession. People v. Murray, 73 Ill. App.2d 376.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.

50645

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. WILLIAM R. CHANDLER, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY CRIMINAL DIVISION

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from the conviction of the appellant, William R. Chandler, for conspiracy with one Marianne Stoesser for the crime of conspiracy to commit theft. Following a bench trial William R. Chandler was sentenced to the penitentiary for a term of not less than one year nor more than three years. On appeal he contends that he was not proven guilty beyond a reasonable doubt.

On July 11, 1964, Theodore Wardzala, a cab driver for Niles Cab Company, picked up Stefan Walkowski, the complaining witness, around 4:30 A.M. on the outskirts of Niles. He then picked up the co-defendant (who is not involved in this appeal) Marianne Stoesser. During the trip to Walkowski's home, Walkowski and Stoesser had a conversation which the cab driver testified was in a foreign language. After dropping off Walkowski he started to drive Stoesser to Higgins and River Road, where she had originally asked to be taken. However, the co-defendant wanted to make a phone call. When she returned to the taxicab after having made the phone call, she asked to be taken to where Walkowski had gotten out, which the driver did.

Stefan Walkowski, the complaining witness, testified that on the evening of July 10-11, 1964, he had attended a soccer match, had had dinner afterwards, and following dinner he had gone to a couple of restaurants where he had had two martinis and two bottles of Lowenbrau. About 4 A.M. he got in a cab. He testified that Marianne Stoesser was already in the cab when he got in. A little after the complainant arrived home he received a phone call from Marianne Stoesser, who

subsequently came to his home. She asked for a drink. They drank wine, the second glass of which Walkowski testified tasted differently and by the third glass he was "nearly finished, dizzy." Marianne Stoesser made some coffee and then made a phone call and after a while a man came in, whom the complaining witness identified as the appellant, William R. Chandler.

Chandler wanted to know what the woman was doing in his house; that she was the wife of a high government official. Chandler and Stoesser then had an argument during which he told her she had to go back to her husband. Chandler then told Walkowski that he was a detective and that Walkowski should get dressed so he, Chandler, could take him down to his office. Upstairs in Walkowski's room Walkowski asked Chandler, "What is the deal?" and Chandler replied, "This is my business to catch people and that cost you $500." Walkowski did not have $500 but did give him $300. The complaining witness was given a receipt with the name "MacArthur" on it. They went downstairs. Marianne Stoesser had already left. Chandler told him, "Now you can go to the police, they will never find me in the world."

The complaining witness was ill for two days and then he went to the police, where he told his story to Officer John Christie who made a drawing of the man described by Walkowski. On July 23 or 24, the complainant identified Marianne Stoesser at the police station. He was shown two women at that time. A couple of days later the complainant identified appellant Chandler out of a group of three men.

Arthur Stoesser, husband of Marianne Stoesser, testified that his wife had an alcohol problem and that he had seen the appellant before, that the appellant was helping his wife with her problem. He further testified that he went to the Niles Police Station on July 23, 1964, and in the presence of Officer Christie and his wife, he stated that the Identi-Kit picture, which Christie had prepared, looked like William Chandler. Marianne Stoesser denied knowing anyone who looked like the drawing.

Marianne Stoesser testified that she had taken the Niles cab around 4:00 A.M. and that Walkowski was already in the cab when she got in. She had a conversation with him and he gave her a note with his name and phone number and $20.00. She testified that she telephoned his home and then went over there. While she was in the complainant's home a man came to the door who said he had been hired to follow her by her husband. She left the house about 8:30 A.M. and the man was still there. She testified further that the man was not the appellant. The appellant denied all knowledge of the offense.

Chandler testified that on July 11, 1964, he had slept until about 7:30 A.M. and that he then went to visit some friends, a Mr. and Mrs. Morse at 8:00 A.M. The Morses testified that the appellant had visited them on the date in question. Elaine Morse, however, testified that the appellant had come sometime before a quarter to nine.

The central issue on this appeal is the sufficiency of the identification of the appellant as the man who was in the complaining witness' home in the early hours of July 11, 1964. The complaining witness described the appellant sufficiently well to enable Officer John Christie to construct a likeness of the appellant, which was identified as the appellant by the husband of the co-defendant. Furthermore, when the appellant was brought before the complainant in a three man line-up, the complainant, Walkowski, immediately and unequivocally identified the appellant.

The law in Illinois has long been that a single positive identification is sufficient to convict. People v. Wilson, 1 Ill.2d 178, 115 N.E.2d 250; People v. Ikerd, 26 Ill.2d 573, 188 N.E.2d 12; People v. Soldat, 32 Ill.2d 478, 207 N.E.2d 449.

The Court in Ikerd, supra, said, at Page 579:

> "....This court has reiterated the rule that a conviction cannot be deemed to be sustained by evidence beyond a reasonable doubt if the identification of the accused was vague, doubtful and uncertain. People v. Williams, 12 Ill.2d

80, 82; People v. Horodecki, 15 Ill.2d 130, 134. However, a single identifying witness has been held sufficient to sustain a conviction, People v. Hunter, 23 Ill.2d 177, 180; People v. Brown, 16 Ill.2d 482, 485, 486...."

In People v. Haywood, 72 Ill. App.2d 109, 111, 218 N.E.2d 790, 793, the court reaffirmed the rule, saying:

"It is well settled that a positive identification by one witness is sufficient for conviction even though the testimony is contradicted by the defendant."

In view of the positive description and identification of the appellant by the complaining witness and the corroboration by the husband of the co-defendant, we find that there is no merit in the contention of the appellant that there was an insufficient identification of him.

The appellant also raises the issue of the sufficiency of the evidence on the conspiracy issue. It is true that mere association between parties does not show conspiracy. It is also true that a conspiracy need not be proved by direct evidence of an express agreement, but may be proved as well by conduct which discloses a common design in pursuance of a common criminal purpose.

The court in People v. Looney, 324 Ill. 375, 384, 155 N.E. 363, 366, said:

"A conspiracy need not be proved by direct evidence of an express agreement to do the unlawful thing to be accomplished. It is generally proved by a number of acts, documents, statements, facts and circumstances, each of which, merely of its own force separately considered, may seem unconnected with any concerted scheme and may have no tendency to prove the common purpose, and yet, when all are considered together in their relation to one another, to the parties, to their effect, to their apparent object and the final result accomplished, they may be sufficient to convince the mind to a moral certainty that the persons accused have adopted a criminal course of action to accomplish that result. The existence of the crime may be proved not only by direct evidence but as well by inference from conduct which discloses a common design on the party of the accused to act together in pursuance of the common criminal purpose. Spies v. People, 122 Ill. 1; Franklin Union #4 v. People, 220 Ill. 355; People v. Flack, 125 N.Y. 324; Kelley v. People, 55 id. 565."

Upon a search of the record it is our opinion that more than mere association between the appellant and Marianne Stoesser was shown, and that, for that reason the conviction for conspiracy to commit theft must be affirmed.

In the light of our holding that the identification of the appellant, William R. Chandler, was positive and unequivocal, we do not find it necessary to consider the credibility of the alibi which the appellant introduced.

For the above reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, J., and BURKE, J., concur.

51155

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES MASON, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY CRIMINAL DIVISION

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of robbery and was sentenced to 1 to 6 years in the State penitentiary. He appeals.

Defendant maintains that the identification of him by the complaining witness was insufficient to support the conviction beyond all reasonable doubt and likewise the testimony of the investigating police officer relating to an oral confession was insufficient to support the conviction beyond all reasonable doubt.

On August 16, 1965, the complaining witness, Gary Boehringer, was employed as bread delivery truck driver. Approximately 9:20 A.M. on that date he made a delivery at a restaurant in the 1200 block of South Ashland Avenue in Chicago. While he was in the restaurant a man, later identified by Boehringer as defendant, entered the restaurant and left shortly after Boehringer left.

Outside, Boehringer noticed another man lingering near the delivery truck, apparently intoxicated. Boehringer entered the truck closed the door and proceeded to the rear to return some unsold bread. At this point he heard the door open, turned and saw defendant with a gun. Defendant ordered Boehringer to face the sidewall of the truck, after which a second man entered the truck and remained in the front.

Boehringer's money, wallet and wristwatch were taken, but the robber was unable to remove Boehringer's wedding band. Boehringer was ordered to lie on the floor and the two men left. A few seconds later Boehringer got up and observed the two men walk down 13th Street until they turned into an alley. Boehringer called the police

but the two men were not apprehended at this time.

On August 18th, two days after the robbery, Boehringer was making deliveries in the vicinity of Roosevelt Road and Paulina Street, two blocks from the scene of the robbery, when he saw defendant standing in the doorway of a tavern. He drove to a gasoline filling station and telephoned the police. The police drove Boehringer to the tavern and as they arrived, Boehringer testified, defendant threw his hands into the air and walked into the street. Boehringer identified defendant as one of the holdup men; defendant denied the charge.

Boehringer testified that he recognized defendant as one of the robbers from "his face, size and gait." He further stated that he was frightened for a few seconds at the beginning of the robbery, that his attention was not centered on the gun which defendant was holding, and that he looked defendant "dead in the eye."

Police Officer Michael Invergo testified that he was one of the officers who questioned defendant after the arrest. Defendant admitted committing the robbery, but the confession was never reduced to writing. During the questioning defendant named two other men as having participated in the robbery, but after the police investigated this charge it proved to be false. Defendant thereafter implicated another man, but the police were unable to locate him.

Defendant advanced the defense of alibi and testified that at the time the robbery was occurring, he was polishing a friend's automobile near the Cook County Hospital. He denied having committed the robbery.

Defendant's first contention, that Boehringer's testimony was insufficient to establish his guilt beyond a reasonable doubt, is untenable. A positive identification by a single witness who had ample opportunity to observe the accused will support a conviction. People v. Mack, 25 Ill.2d 416, 421. The record shows that Boehringer

gave a clear account of the incident and a good description of the defendant. He had ample opportunity to observe, first in the restaurant, next during the robbery and finally as the two robbers were fleeing. He testified that he looked defendant "dead in the eye" during the robbery and later recognized him from "his face, size and gait." He saw defendant two days after the robbery a short distance from where it had occurred, recognized him as one of the robbers and caused his arrest. The fact that defendant was wearing sunglasses at the time of the robbery does not destroy the identification in view of the close proximity between defendant and Boehringer at the time. Although defendant did have a mustache and a scar on his nose to which Boehringer did not testify, the record indicates that the mustache was "pencil thin" and that the scar was about a half-inch long, on the side of the nose and barely noticeable from a front view. The credibility of a witness is not destroyed by his failure to describe specific physical features of the accused. People v. McCall, 29 Ill.2d 292. The trial court believed the testimony of Boehringer and disbelieved the alibi of defendant. A reviewing court will not disturb a conviction unless the proof is so unsatisfactory as to raise a reasonable doubt as to a defendant's guilt. People v. Woods, 26 Ill.2d 582, 585.

Defendant's second contention, that Officer Invergo's testimony relating to the oral confession is insufficient to support the conviction, is likewise untenable. Again, the trial court heard the evidence and chose to believe the police officer. The testimony of Officer Invergo in this regard is buttressed by the fact that defendant named three other men in connection with the robbery. Defendant also maintains that, because the confession was not reduced to writing, it is not trustworthy. There is no requirement that a confession be written. On all the facts defendant was proven guilty

beyond a reasonable doubt.

The judgment is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and LYONS, J., concur.